92-482

No. ——

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*

v.

AMERICAN LAND TITLE ASSOCIATION, NEW YORK STATE LAND TITLE ASSOCIATION, STEPHEN L. STEINBRINK, in his official capacity as ACTING COMPTROLLER OF THE CURRENCY, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether Congress repealed the provisions of a paragraph of Public Law No. 65-270, appearing at 39 Stat. 752, 753 (1916), formerly codified at 12 U.S.C. § 92 ("section 92"), in 1918 by its enactment of Public Law No. 65-121, 40 Stat. 506 (1918)?

2. If section 92 is still law, whether it "impliedly bars," by negative implication, national banks not located in towns of 5,000 inhabitants or less from engaging in those insurance agency activities that are incidental to the business of banking under authority of section 24 (Seventh) of the National Bank Act, 12 U.S.C. § 24 (Seventh) (1988 & Supp. II 1990)?

## PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The plaintiffs in the district court case were also the appellants in the court of appeals. The plaintiffs were the American Land Title Association and the New York Land Title Association. The defendants in the district court case were also the appellees in the court of appeals. The defendants were Robert L. Clarke, in his official capacity as then Comptroller of the Currency and the Office of the Comptroller of the Currency, an agency of the United States, and The Chase Manhattan Bank, N.A., as Intervenor-Defendant.

## LIST OF PARENT CORPORATION AND NONWHOLLY-OWNED SUBSIDIARIES

The only parent company of Applicant is The Chase Manhattan Corporation. The direct and indirect subsidiaries of the Applicant (other than wholly-owned subsidiaries) are:

Banco Chase Manhattan, S.A.

Chase Automated Clearing House, Inc.

Chase Manhattan Administracao & Servicios, S.A.

Chase Manhattan Correctora de Seguras Ltda.

Chase Manhattan Financeira, S.A.

Chase Manhattan S.A. Distribuidora de Titulos e Valores Mobiliacios

Chase Paulista Participacoes, S.A.

Corporacion Falcon, Inc.

Corporacion Mexicana de Aviacion, S.A.

Credit Martiniquais

Electronic Payment Service Company (Hong Kong) Ltd.

Ims Imoveis Ltda.

O.A. Venezolano de Pulpa y Papel

Panterhaven Ltd.

Rating Agency Malaysia Berhad

Societe de Developpement Regional Antilles.

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THE CHASE MANHATTAN BANK, N.A.,
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v.

AMERICAN LAND TITLE ASSOCIATION, NEW YORK STATE LAND TITLE ASSOCIATION, STEPHEN L. STEINBRINK, in his official capacity as ACTING COMPTROLLER OF THE CURRENCY, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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The Chase Manhattan Bank, N.A., by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 968 F.2d 150 (2d Cir. 1992) and reproduced at Appendix ("App.") 1a. The judgment of the district court (App. at 17a) is reported at 772 F. Supp. 1353 (S.D.N.Y. 1991). The approval letter from the Office of the Comptroller of the Currency (App. at 30a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Bank Act, and other related statutory provisions, Act of June 3, 1864, ch. 106, § 8, 13 Stat. 101 (1864) (codified as amended at 12 U.S.C. § 24 (Seventh) (1988 & Supp. II 1990)); Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (1916)[1]; and Act of April 5, 1918, ch. 45, § 20, 40 Stat. 506, 512 (1918), are set forth in Appendix F hereto.

## STATEMENT

### A. Introduction

This case arises out of the Office of the Comptroller of the Currency's ("OCC") approval of Petitioner's, The Chase Manhattan Bank, N.A. ("Chase"), application to sell title insurance as agent in connection with residential and commercial real estate loans made by Chase and its affiliates. The petition seeks this Court's resolution of a direct and admitted conflict among the United States Courts of Appeals of substantial and recurring importance: whether a provision of the laws relating to national banks formerly codified at 12 U.S.C. § 92 remains in effect. If the Court determines that section 92

[1] Title 12 of the United States Code, unlike a number of other titles, such as Title 18, Title 28, and Title 49, has never been enacted as a positive-law title. The pertinent provision of the 1916 Act was codified at 12 U.S.C. § 92 in 1926, but commencing in 1952 it was dropped from the text of the United States Code, and currently appears neither in the United States Code nor in the United States Code Annotated as published by West. The text given in the Appendix is taken from the text of Volume 39 of the Statutes at Large. For convenience, we will refer to the enactment in question as "section 92."

remains law, this petition presents a second issue of equally substantial and recurring importance over which there is a conflict, albeit not fully acknowledged, among the circuits: whether section 92 "impliedly bars," by negative implication, national banks from engaging in those insurance-related activities determined by the OCC to be incidental to the business of banking under a provision of the National Bank Act ("NBA"), 12 U.S.C. § 24 (Seventh) (1988 & Supp. II 1990) ("section 24 (Seventh)").

The Second Circuit's ruling that section 92 "impliedly bars" *all* national banks not located in small towns "from engaging in insurance agency activities in general," (App. at 14a), eliminates the Comptroller's broad discretion—which discretion has been well respected by this and other federal courts[2]—to determine which insurance activities are incidental to the business of banking under section 24 (Seventh). Moreover, the decision is contrary to numerous administrative rulings over the years by the Comptroller which have been upheld by the courts. If left standing, the adverse economic consequences to the national banking system engendered by this plainly erroneous decision will be substantial.

**B. The Statutory and Regulatory Scheme**

The OCC is a federal agency charged with supervision and regulation of the nation's approximately 4,500 national banks as well as the administration of the national banking laws. National banks are corporations chartered by the Comptroller of the Currency ("Comptroller") for the purpose of carrying on the business of banking, 12 U.S.C. § 21 (1988), and their corporate powers are defined primarily by the NBA. Section 24 (Seventh) sets forth the basic corporate powers of national banks. In enacting the NBA in 1864, Congress authorized national banks to exercise not only those powers that Congress specifically granted in section 24 (Seventh) (*e.g.*, receiving deposits, lending money, etc.) and elsewhere in the

[2] *See, e.g., Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987).

NBA, but also to exercise those "incidental powers . . . necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). Over 50 years later, in 1916, Congress *supplemented* the statutory powers of national banks located in towns of 5,000 or fewer inhabitants by expressly authorizing such banks "*in addition to the powers now*[3] *vested by law* in national banking associations" to conduct unlimited insurance agency business by acting as full-service insurance agents "for any fire, life, or other insurance company." Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 ("section 92") (emphasis added).

Under regulations promulgated by the Comptroller, 12 C.F.R. § 5.34 (1992), national banks may establish "operating subsidiar[ies]" to engage in activities "which are part of or incidental to the business of banking." *Id.* § 5.34(c). A national bank proposing to perform new activities through an operating subsidiary is required to submit a written notification to the OCC. *Id.* § 5.34(d)(1). Upon receipt, the OCC reviews the written notification "to determine if the proposed activities exceed those legally permissible for a national bank's operating subsidiary and to ensure that the proposal is consistent with prudent banking principles and [OCC] policy." *Id.* § 5.34(d)(1)(iii).

**C. Comptroller's Approval**

Pursuant to this statutory and regulatory framework, on March 3, 1989, Chase, a national banking association, notified the OCC in writing (the "Notification Letter") that it intended to establish two operating subsidiaries to sell title insurance as agent in connection with residential and commercial real estate loans made by Chase and its affiliates. By letter dated June 20, 1989, the OCC approved Chase's Notification Letter based upon the OCC's determination that "selling title insurance is incidental to national banks' explicit authority to make, arrange, buy and sell mortgage loans under 12 U.S.C. §§ 24(7) and

[3] The date of enactment was September 7, 1916.

371."[4] App. at 32a. The OCC found that Chase's proposal to sell title insurance as agent was "consistent in all material respects"[5] with a 1986 interpretive letter concluding that selling title insurance is incidental to the business of banking and therefore is a permissible activity for national banks (the "1986 Interpretive Letter").[6]

In concluding that section 92 did not prohibit national banks from acting as agent in the sale of title insurance, the 1986 Interpretive Letter relied on the decision of the Court of Appeals for the District of Columbia Circuit in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"), which, as the OCC noted, rejected the "proposition that national banks' incidental powers are limited to those permitted under 12 U.S.C. § 92." App. at 42a. In addition, the OCC's approval of the Notification Letter comported with the position taken by the OCC since at least 1965 that "a National Bank, wherever located, may, under its corporate powers contained in

[4] The OCC noted that this determination "also is supported by judicial recognition that it is incidental to banking, and therefore permissible, for national banks to sell forms of limited purpose insurance related to the traditional lending activities of banks." App. at 32a.

[5] *Id.*

[6] Comptroller Interp. Letter No. 368, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986) (App. at 33a). The 1986 Interpretive Letter was challenged by the American Land Title Association on the ground that "[s]ection 92 prohibits national banks from engaging in title insurance activities in communities with populations exceeding 5,000." *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. 491, 497 (W.D. Tex. 1989). ALTA also challenged in that case a second OCC Interpretive Letter, Comptroller Interpretive Letter No. 377, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,601 (Feb. 6, 1987), which approved title insurance agency and underwriting activities by a national bank operating subsidiary. The court dismissed the lawsuit, ruling that the Interpretive Letters did not constitute "final agency action" and that the matter therefore was not ripe for review. *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. at 498-99.

paragraph Seventh of 12 U.S.C. 24, act as an agent in the issuance of title insurance which is incident to a banking transaction." [7]

**D. The District Court Decision**

The American Land Title Association and the New York State Land Title Association (hereinafter collectively referred to as "ALTA") filed a complaint in the District Court for the Southern District of New York challenging the OCC's approval of the Notification Letter.[8] The complaint alleged that national banks not headquartered in small towns are impliedly prohibited from engaging in title insurance activities by section 92, that title insurance activities are authorized neither by the incidental powers clause of section 24 (Seventh) nor any other provisions of federal law, and that such activities therefore are "*ultra vires*." ALTA sought declaratory and injunctive relief.

The district court granted defendants OCC's and Chase's motions to dismiss the complaint. Applying the principles governing judicial deference to an agency's interpretation of its governing statute outlined in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"), the district court held that the OCC had rationally concluded "that the sale of title insurance in connection with real estate loans made by a national bank is incidental to the express power of a national bank to make real estate loans." App. at 26a. The court further ruled that "it is rational to conclude that title insurance, like credit life insurance,[9] is an activity considered incidental to the business of banking

[7] Letter from R. Coleman Egertson, Deputy Comptroller of the Currency (Aug. 3, 1965). App. at 45a.

[8] Chase moved for and was granted leave to intervene as a defendant.

[9] The sale of credit life insurance as agent by national banks was at issue in *Heimann*.

in that it is a limited type of coverage that protects the lender in the event of a default." *Id.*

In so holding, the district court rejected ALTA's contention that section 92—the 1916 statute permitting national banks located in small towns to act as general agent in the sale of any type of insurance without regard to whether the sale of such insurance is incidental to the business of banking—should be interpreted impliedly to prohibit, by negative implication, national banks doing business in places with populations of greater than 5,000 from engaging in the sale, as agent, of title insurance as an incident to the business of banking. The district court concluded that "it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision, not a limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh)." *Id.* In upholding the OCC's administrative ruling, the district court noted that "courts have held in the past that various types of 'insurance' are incidental to the business of banking and not prohibited by § 92." App. at 25a.

**E. The Court of Appeals Decision**

ALTA appealed on the ground "that the district court erred in upholding the OCC's view that 12 U.S.C. § 92 places no limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh)." App. at 11a. In an opinion issued June 15, 1992, the court of appeals for the Second Circuit agreed with ALTA, reversed the judgment of the district court and directed it to enter summary judgment for ALTA. App. at 16a.

Before addressing the contentions of the parties, however, the Second Circuit felt "compelled to address" the issue whether section 92 remained in effect, "even though the parties neither briefed nor argued it." App. at 3a. After the present case already had been submitted for decision to the Second Circuit, the D.C. Circuit held in *Independent Insurance Agents* v. *Clarke*, 955 F.2d 731,

739 (D.C. Cir. 1992), that "section 92 has ceased to exist" due to Congress' omission of section 92 when it revised and reenacted section 5202 of the Revised Statutes in 1918. According to the D.C. Circuit, even "[i]f the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts." *Id.*

The Second Circuit flatly rejected the D.C. Circuit's ruling, holding instead that section 92 remains in full force and effect. The Second Circuit said: "[c]ontrary to the view of the D.C. Circuit, we believe that this omission was inadvertent and thus we do not interpret it as having effected a repeal of section 92." App. at 5a.

After ruling that section 92 "remains valid law," the Second Circuit took up ALTA's contention that "section 92 impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants." App. at 11a. While acknowledging that section 92 "obviously provides no *explicit* limitation on national bank activity," the court of appeals nevertheless concluded that section 92 should be interpreted to "*impliedly bar*[] national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general," a holding which it applied to the title insurance agency business in particular. App. at 11a, 14a (emphasis added).[10]

In attempting to bolster this ruling with its analysis of two letters from what it called the "sparse" legislative history of section 92,[11] the court ignored the plain language of section 92 in which Congress unambiguously

[10] In reaching this conclusion, the court relied upon the questionable principle of *expressio unius est exclusio alterius* as applied, or misapplied, in the widely questioned decision in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010, 1013-14 (5th Cir. 1968).

[11] App. at 12a. These documents consisted of a letter from counsel to the Federal Reserve Board to a governor of the Board and a letter from the Comptroller to the Senate Banking Committee.

declared that the powers granted by section 92 were "in addition to the powers now vested by law in national banking associations." [12] In disregard of this determinative textual statement of congressional intent on the precise question at issue, the court found "that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents." App. at 12a.[13]

The court of appeals never reached the issue whether title insurance agency activities are incidental to the business of banking under section 24 (Seventh), saying that "[b]ased on our interpretation of section 92, we see no need to determine the scope of section 24 (Seventh)." [14]

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[12] App. at 48a. In parsing these letters for the barest glimmers of legislative intent, the court ignored the fact that the Comptroller's letter on which it relied stated that the purpose of section 92 was to "enlarge" the powers of small town banks in order to improve their profitability. 53 Cong. Rec. 11,001 (July 14, 1916). Nor did the court consider the contrary legislative analysis of the Eighth Circuit in *Independent Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n.6 (8th Cir. 1984): "[t]he legislative history [of section 92] indicates that Congress was concerned only with providing small-town banks with an additional profit source, *not with prohibiting city banks from selling insurance*." (emphasis added).

[13] In light of its determination that section 92 clearly "evinces" Congress' intent, the court reviewed the OCC's construction of section 92 under the first prong of *Chevron* and declined to accord any deference to the OCC's ruling, stating that "[t]o defer to the OCC in this case would flout Congressional intent—something we remain unwilling to do." App. at 16a.

[14] If this Court determines that section 92 does not exist or, if it does exist, does not limit national banks' incidental powers under section 24 (Seventh), the Court may remand this case to the Second Circuit for determination of this issue. Alternatively this Court may, "in the interest of judicial economy" and in light of the district court's compelling analysis of this issue, wish to determine

App. at 15a. Having determined that section 92 impliedly "prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business," the court concluded that "even if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the *specific limits* on insurance activity *contained in section 92*." App. at 16a (emphasis added). Section 92, however, contains no such "specific limits" and its express language does not address, much less preclude, national banks located in larger communities from engaging in those insurance agency activities that are incidental to the business of banking.

## REASONS FOR GRANTING THE WRIT

The court of appeals' decision warrants this Court's attention because it presents issues of substantial and recurring nationwide importance concerning the scope of national banks' powers that have generated conflicting holdings among the courts of appeals. As the Second Circuit expressly acknowledged, its decision in this case conflicts with the recent holding of the D.C. Circuit that "section 92 has ceased to exist."[15] In addition, the Second Circuit's ruling that section 92 "impliedly bars" national banks from engaging in insurance agency activities, even if such activities are in lines of insurance incidental to the business of banking under section 24 (Seventh), conflicts with an earlier decision of the D.C. Circuit rejecting the argument that section 92 "by clear implication" barred national banks in towns of more than 5,000 inhabitants from selling credit life insurance. *Independent Bankers*

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at this time whether the Comptroller acted within the broad confines of his allowable discretion in determining that section 24 (Seventh) authorizes national banks to act as agents in the sale of title insurance. *See Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968); 28 U.S.C. § 2106 (1988).

[15] *Independent Ins. Agents* v. *Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992).

*Ass'n* v. *Heimann*, 613 F.2d 1164, 1169 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).[16] Although the Second Circuit did not explicitly acknowledge this conflict, the court clearly failed in its strained attempt to distinguish *Heimann* based on its flawed understanding of the nature of credit life and title insurance. *See* p. 17 n.29.

The decision of the Second Circuit sharply curtails the fundamental statutory authority of all national banks to exercise those "incidental powers" under section 24 (Seventh) that are necessary to carry on the business of banking. Enacted as part of the original NBA in 1864, this essential statutory authority has played a critical role in the long-term success and viability of the national banking system. The decision below directly undermines the authority of national banks to continue to engage in a broad range of activities that are both convenient and necessary to their continuing viability and vitality.

The Second Circuit's decision squarely contravenes the plain language of section 92 and mistakenly relies on isolated snippets of ambiguous legislative history taken out of context to override the plain meaning of an unambiguous statutory declaration of congressional intent on the precise question at issue in this litigation—whether section 92 constitutes a supplement to or limitation on national banks' incidental powers under section 24 (Seventh). Further, the court of appeals failed to accord the Comptroller's interpretation of sections 92 and 24 (Seventh) the "substantial deference" that this Court often has stated is required.

As a consequence, the Second Circuit has put those national banks within its jurisdiction at a distinct competitive disadvantage both as to other types of financial institutions, and possibly as to national banks located in

[16] The *Heimann* court "presumed" the continuing validity of section 92. *See Independent Ins. Agents* v. *Clarke*, 955 F.2d at 737.

other circuits that have not construed section 92 as impliedly barring the exercise of statutory powers granted elsewhere in the national banking statutes.[17] The circuit courts have reached an irreconcilable impasse on this issue. Guidance from this Court is urgently needed to put an end to nearly 25 years of confusion and uncertainty regarding the relationship between section 92 and section 24 (Seventh), and, indeed, to resolve the issue of section 92's existence. Both are issues of substantial importance to the national banking system.

## I. CONFLICT REGARDING THE CONTINUED EXISTENCE OF SECTION 92

The D.C. Circuit recently decided the same issue initially faced by the Second Circuit in this case—whether Congress repealed section 92 in 1918—and reached the opposite conclusion, ruling that "Congress has stricken [section 92] from the statute books." *Independent Ins. Agents*, 955 F.2d at 739. The Second Circuit, as noted above, expressly rejected the ruling of its sister circuit and held that "section 92 remains valid law." App. at 10a.

Resolution of this issue of substantial and recurring[18] national importance may easily dispose of the longstand-

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[17] Before the district court, ALTA sought a nationwide injunction against the Comptroller's authorizing national banks in general to act as agent in the sale of title insurance; the court of appeals, in reversing the district court's dismissal of the complaint, remanded the case to the district court with instructions "to enter summary judgment for the appellants." App. at 16a. Thus, the possibility of an injunctive order of nationwide applicability purporting to restrain the Comptroller from permitting *any* national bank to act as agent for the sale of title insurance is presented.

[18] See *Owensboro Nat'l Bank* v. *Moore*, No. 91-3, slip op. at 16 (E.D. Ky. Aug. 4, 1992), in which the district court recently adopted the analysis of the Second Circuit as its own in holding that Congress did not repeal section 92.

ing controversy over the relationship between section 92 and section 24 (Seventh). If this Court determines that Congress did in fact repeal section 92, this nonexistent statute obviously no longer could be held impliedly to bar the exercise by national banks of powers granted by another statutory provision--section 24 (Seventh). In the event of such a ruling, the only issue remaining would be whether the broad grant of powers in section 24 (Seventh), considered in and of itself and in the light of its consistent interpretation by the OCC, would authorize the sale of title insurance as agent by national banks as incidental to the business of banking.[13]

Little elaboration is necessary to make the point that the question of the continued existence of an Act of Congress--a question admittedly answered in contradictory terms by two contemporaneous decisions of two courts of appeals--is a question worthy of this Court's attention. The considerations in favor of this Court's review become all the more compelling where the Act in question not only provides an important authority of its own but has been the source of conflict between the federal courts of appeals concerning whether it, by negative implication, negates powers of national banks which would otherwise exist.

## II. CONFLICT REGARDING WHETHER SECTION 92 "IMPLIEDLY BARS" ALL NATIONAL BANK INSURANCE AGENCY ACTIVITIES NOT EXPRESSLY AUTHORIZED THEREIN

The Second Circuit ruled that section 92, which does not require that the insurance agency powers exercised pursuant thereto be incidental to the business of banking, "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general." App. at 14a. It applied this ruling to all national banks in places with more than 5,000

[13] We submit that the answer to this question is clearly "yes"; the court of appeals, however, did not reach it.

inhabitants without considering whether specific insurance agency activities—such as credit life or title insurance—are incidental to the business of banking and therefore permissible under section 24 (Seventh). It thus adopted a position consistently rejected by the Comptroller, and rejected by the D.C. Circuit and other federal courts.[20] In reaching its decision, the Second Circuit relied primarily on the statutory analysis contained in the Fifth Circuit's pre-*Chevron* decision in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968) ("*Saxon*"). In *Saxon*, the Fifth Circuit overturned an administrative ruling of the OCC that "National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions." *Id.* at 1012. According to the *Saxon* court, "[s]ince Congress dealt specifically with the insurance agency power in Section 92, the *expressio unius* rule negates the existence of any other power to act as an insurance agent under the general provisions of Section 24(7)." *Id.* at 1014.

During the 24 years that have elapsed since the *Saxon* decision, the OCC and a number of federal courts have disagreed with and refused to follow it. The OCC long has taken the position that *Saxon* was wrongly decided, and has repeatedly ruled that section 92 "does not prohibit a national bank from conducting insurance-related activities if the activities are otherwise authorized by the National Bank Act." Comptroller Interp. Letter No. 331, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,776 (Apr. 4, 1985). *See also* Comptroller Interp. Letter No. 283, [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447, at 77,609 (Mar. 16, 1984) ("[A] national bank may act as agent

[20] In addition, a California Court of Appeal has interpreted a California banking statute, that was copied virtually word-for-word from section 92, as not imposing any restrictions upon the incidental authority of state banks to offer insurance products outside of towns of 5,000 or fewer persons. *Sanford* v. *Garamendi*, 284 Cal. Rptr. 897, 903 (Ct. App. 1991).

in the sale of insurance regardless of 12 U.S.C. § 92, when doing so is incidental to banking.")). The "traditional position of the OCC" is that section 92 simply provides supplemental authority for banks in small towns to act as general insurance agents for *all* types of insurance, without limitation, and "does not affect the powers of national banks located in towns that have a population larger than 5,000." Comptroller Interp. Letter No. 499, [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,213 (Feb. 12, 1990).

The OCC's longstanding disagreement with the *Saxon* court's interpretive approach under section 92 is evidenced by the broad array of insurance and insurance-related activities the OCC has authorized since *Saxon* as incidental to the business of banking. For example, the OCC has authorized national banks to offer debt cancellation contracts,[21] municipal bond insurance,[22] credit-related life insurance,[23] mortgage life insurance, credit disability insurance, involuntary unemployment insurance, vendor's single interest insurance,[24] fixed annuity

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[21] 12 C.F.R. § 7.7495 (1992); *First Nat'l Bank* v. *Taylor*, 907 F.2d 775, 777-78 (8th Cir.), *cert. denied*, 111 S. Ct. 442 (1990).

[22] *See* Comptroller Interp. Letter No. 338, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508, at 77,792 (May 2, 1985); *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[23] 12 C.F.R. § 2.6 (1992); Comptroller Interp. Letter No. 277, [1982-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441 (Dec. 21, 1983) (underwriting credit life insurance).

[24] Comptroller Interp. Letter No. 283, [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447 (Mar. 16, 1984) (agent for sale of credit life and disability, involuntary unemployment and vendor's single interest insurance); Comptroller Interp. Letter No. 495, [1989-90 Transfer Binder] Fed. Banking L. Rep. ¶ 83,084, at 71,204 (Dec. 22, 1989).

products,[25] variable annuity products,[26] and title insurance.[27]

As the district court in this case noted in upholding the Comptroller's approval of Chase's Notification Letter, a number of the Comptroller's administrative rulings authorizing these insurance-related activities as being incidental to the business of banking "and not prohibited by § 92" have been considered and upheld by the federal courts. App. at 25a. For example, in *American Insurance Ass'n* v. *Clarke*, 865 F.2d 278, 281 (D.C. Cir. 1988), the D.C. Circuit upheld the Comptroller's determination that a national bank may offer municipal bond insurance through a subsidiary pursuant to its incidental powers under section 24 (Seventh).

Similarly, in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d at 1170, the D.C. Circuit held that the incidental powers clause of section 24 (Seventh) authorizes national banks, irrespective of their location, to act as agents for the sale of credit life insurance. The D.C. Circuit rejected the contention, accepted by the Second Circuit in this case, that section 92 "carries a clear implication" that national banks in towns of more than 5,000 inhabitants "have no authority" to act as agent in the sale of insurance. *Id.* In so ruling, the D.C. Circuit,

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[25] *See* Comptroller Interp. Letter No. 499, [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,211-12 (Feb. 12, 1990).

[26] *See* Comptroller Interp. Letter No. 331, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,776 (Apr. 4, 1985).

[27] *See* Comptroller Interp. Letter No. 368, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,858 (July 11, 1986) (agent for sale of title insurance); Comptroller Interp. Letter No. 377, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,601, at 77,901 (Feb. 6, 1987) (underwriting title insurance); Comptroller Interp. Letter No. 450, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,674, at 78,062 (Sept. 22, 1988).

unlike the Second Circuit in this case, took special note of the fact that "by its own terms, [section 92] does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." [28] *Id.* at 1170 n.18. The court below made a half-hearted attempt to distinguish *Heimann* [29] but then appeared to acknowledge a conflict by claiming that the *Heimann* opinion lacked persuasiveness. App. at 15a.

In *Variable Annuity Life Insurance Co.* v. *Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal filed*, No. 92-2010 (5th Cir.), the district court signaled the widespread erosion in support for *Saxon* even within the Fifth Circuit in upholding the Comptroller's determination that a

[28] Similarly, in *Independent Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 736 F.2d at 477 n.6, the Eighth Circuit observed that "[t]here is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance."

[29] The court of appeals attempted to distinguish *Heimann* by claiming that credit life insurance was analytically different from title insurance in respects pertinent to this case. The court mistakenly asserted that, in the sale of credit life insurance, the bank assumed the risk of the borrower's death; rather, the insurance company assumes such risk. The court also misunderstood the purpose of credit life insurance. It is not the case, contrary to the court's understanding, that credit life insurance "protects only the lender's interest by insuring that his loan will be repaid even if the borrower dies." (App. at 15a); all forms of credit life insurance protect the interests of both the lender and the borrower's estate. *See* 1986 Interpretive Letter, App. at 33a-34a. If a borrower obtains a $10,000 loan, takes out credit insurance, and dies the next day, his estate is $10,000 richer than if the loan and the the insurance had never been effected. In fact, title insurance often is sold in a form that protects only the mortgagee's interest and not the equity owner's interest. The distinction, accordingly, cuts in exactly the opposite way from what the court said. In any event, the supposed distinction between credit life and title insurance is irrelevant to the central issue raised the effect of section 92 on the powers granted national banks by section 24 (Seventh).

national bank may sell various types of annuity contracts on an agency basis. In language nearly identical to that used by the district court in the present case, the court ruled "that it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision and not a limitation on national banks incidental powers under § 24(7)." *Id.* at 642.

In reliance upon the OCC's approval of the broad array of insurance-related activities summarized above as being incidental to the business of banking, national banks presently conduct a large volume of business as agents for, or brokers of, a variety of insurance products. The decision of the Second Circuit that section 92 "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities *in general*," directly threatens the continuing ability of national banks located within the Second Circuit and possibly beyond,[39] to engage in these regulatorily authorized insurance-related activities which are incidental to the business of banking and therefore permissible under section 24 (Seventh). App. at 14a (emphasis added).

Under the Second Circuit's decision, the ability of national banks to exercise incidental powers available under section 24 (Seventh) may vary according to their location. Banks within the D.C. Circuit's jurisdiction (and indeed in all jurisdictions outside of the Second Circuit and possibly the Fifth Circuit) may remain able—depending on the ultimate scope of the yet to be issued injunction—to engage in a broad range of insurance-related activities without restraint or limitation from section 92, as long as such activities are incidental to the business of banking. National banks located within the Second Circuit, in contrast, will be prohibited from engaging in such incidental insurance-related activities. Resolution of this untenable

[39] *See* Section IV pp. 24-25.

situation necessitates this Court's review of the important intercircuit conflict presented by this case.

## III. THE COURT OF APPEALS' DECISION CONTRAVENES NUMEROUS BASIC RULES OF STATUTORY CONSTRUCTION

Not only does the Second Circuit's decision raise important issues, its departure from the norms of statutory construction endorsed by this Court warrants review.

### A. Ignoring the Plain Meaning Rule

The best indication of a statute's meaning is its express language: "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). *See also Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991); *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-75 (1986); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

The opening phrase of section 92 which states that the powers granted by that section were "in addition to the powers now vested by law in national banking associations," provides a clear, unambiguous signal that in enacting section 92, Congress intended to grant supplemental powers to a specified class of national banks rather than limiting the powers previously granted to all national banks by the provisions of the NBA.[31] The phrase "in addition to" is so clear as to be beyond interpretation. It means adding, increasing, or augmenting. Oxford English Dictionary 104 (Compact ed. 1971). By its plain terms, section 92 is an express grant of additional statutory authority to a limited class of national banks, those

[31] As noted above, all national banks had been authorized by section 24 (Seventh) to exercise those "incidental powers . . . necessary to carry out the business of banking" for over 50 years prior to the enactment of section 92.

in small towns, to conduct unlimited insurance agency business by acting as full-service insurance agents, without regard to whether such activities are incidental to the business of banking. The court below erred in holding that this limited, permissive statute impliedly prohibits all national banks not described therein from engaging in insurance activities otherwise authorized by section 24 (Seventh) as incidental to the business of banking.[42]

### B. Ignoring the Rule of Deference to Administrative Statutory Construction

The courts may invalidate the Comptroller's decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). In applying this standard, it is well settled that

> "courts should give great weight to *any reasonable construction* of a regulatory statute adopted by the agency charged with enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws."

*Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-27 (1971)) (emphasis added) (citation

[42] "By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Heimann*, 613 F.2d at 1170, n.18. *Accord Variable Annuity Life Ins. Co.* v. *Clarke*, 786 F. Supp. at 641 (noting that the plain language of section 92 permits national banks in towns with populations less than 5,000 to act as agent for fire, life or other general insurance companies, but does not speak to prohibitions in towns greater than 5,000); *Sanford* v. *Garamendi*, 284 Cal. Rptr. at 903 ("[E]xpress grant of authority to a limited class of banks to sell specified types of insurance . . . does not, merely because of its limited permissive application, impliedly prohibit all banks not described therein generally from selling insurance.").

omitted). *See also Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-44.[33]

Before a court reviews an agency's construction of a statutory provision however, it must first determine as a preliminary matter whether Congress has addressed the specific question at issue. *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-53. *See also Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. at 373 (plain purpose of legislation determined by reference to plain language of statute itself). At issue in this case is whether section 92 is a supplemental powers provision or a limitation on national banks' incidental powers under section 24 (Seventh). Congress clearly has addressed this question. The phrase—"in addition to"—prefacing section 92 provides a definitive statement of Congress' intent to supplement, not limit, national banks' existing statutory powers. Accordingly, the court of appeals' inquiry should have ended with the actual words of the statute.

If, however, it somehow could be found that those words alone are not sufficient evidence of congressional intent, the court of appeals would be required to defer to any reasonable interpretation by the Comptroller. *Chevron*, 467 U.S. at 844 (court precluded from substituting its own judgment if agency's decision is rational and reasonable); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-04. Although a court may not uphold an administrative

[33] *Accord Department of Banking & Consumer Fin.* v. *Clarke*, 809 F.2d 266, 269 (5th Cir.) ("We are charged to uphold the Comptroller's determination if we find it to be a 'permissible construction' of the National Bank Act."), *cert. denied*, 483 U.S. 1010 (1987); *see also First Nat'l Bank* v. *Taylor*, 907 F.2d at 777-78; *Securities Indus. Ass'n* v. *Clarke*, 885 F.2d 1034, 1042 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Investment Co. Inst.* v. *Conover*, 790 F.2d 925, 932 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986).

statutory interpretation that is contrary to the "clear meaning of a statute as revealed by its language, purpose and history," *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979) (quoting *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979)), the agency's interpretation need not be shown to be the only permissible view, *Chevron*, 467 U.S. at 843 n.11.

### C. Abuse of "Expressio Unius" Maxim

The court of appeals also erred in relying on the discredited maxim of *expressio unius* to override the plain meaning of the statutory language. Courts repeatedly have recognized that the maxim is unreliable at best and in any event should not be applied where it would produce a result in contravention of clear statutory language or a consistent administrative statutory construction.[31]

Of direct relevance to this case, the courts have held that the *expressio unius* maxim "should not prevail when a nonexclusive reading [of the statute] . . . *allows the exercise of incidental authority necessary to an expressed power or right.*" *Bailey* v. *Federal Intermediate Credit Bank*, 788 F.2d 498, 500 (8th Cir.), *cert. denied*, 475

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[31] *See, e.g., Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting application of maxim and noting maxim must be subordinate to doctrine that courts will construe details of an act in conformity with its dominating general purpose); *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2537-38 (1991) (maxim "'is a questionable one in light of the dubious reliability of inferring specific intent from silence'" (quoting Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n.182 (1990))); *Director* v. *Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) ("maxim is to be applied with great caution and is recognized as unreliable"); *Neuberger* v. *Commissioner*, 311 U.S. 83, 88 (1940) (maxim can never override clear and contrary evidence of Congress' intent); *Cheney R.R. Co.* v. *I.C.C.*, 902 F.2d 66, 68-69 (D.C. Cir.) (agency view overcomes *expressio unius* canon), *cert. denied*, 111 S. Ct. 519 (1990); *Clinchfield Coal Co.* v. *Federal Mine Safety & Health Comm'n*, 895 F.2d 773, 779 (D.C. Cir.) (maxim not applied to override *Chevron*), *cert. denied*, 111 S. Ct. 137 (1990).

U.S. 915 (1986) (emphasis added). *See also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.25, at 234 (5th ed. 1992 Rev.). The court of appeals ignored the very substantial limitations on the use of this maxim of questionable validity and incorrectly relied on it as the basis for disregarding the plain meaning of the explicit statutory language of section 92.

Moreover, even if the maxim were pertinent here, the court of appeals' application of the *expressio unius* maxim was incorrect. As applied to section 92, the maxim would at most suggest that national banks in places of greater than 5,000 inhabitants cannot engage in the full range of general insurance agency activities authorized by section 92; the maxim does not have any application with respect to specific insurance agency activities that are incidental to banking under section 24 (Seventh). Accordingly, even assuming *arguendo* that the *expressio unius* maxim were applicable in this case, the Second Circuit's interpretation of that canon was improper.

**D. Misuse of Legislative History**

Finding no basis in the plain language of section 92 to displace the Comptroller's approval of Chase's Notification Letter, the court of appeals mistakenly interpreted isolated documents from section 92's extremely limited legislative history as supporting an implied limitation on section 24 (Seventh)'s broad grant of "incidental powers." The meager and ambiguous legislative history that exists does not contradict the section 92 text and the Comptroller's interpretation of it as a supplemental powers provision. The courts have recognized that section 92 was originally proposed by the Comptroller to provide an additional source of revenue for national banks located in small towns and not to prohibit city banks from selling insurance where incidental to banking transactions.[35]

[35] *Independent Ins. Agents*, 736 F.2d at 477 n.6; *Saxon*, 399 F.2d at 1015; *Heimann*, 613 F.2d at 1169-70; *see also Variable Annuity*

In recommending adoption of section 92, then-Comptroller Williams stated in a letter to the Chairmen of the Senate and House Banking Committees that "[f]or some time I have been giving careful consideration to the question as to how *the powers* of the national banks might be *enlarged* so as to provide them with additional sources of revenue . . . ." [36] 53 Cong. Rec. 11,001 (July 14, 1916). Similarly, Senator Owen, the Chairman of the Senate Banking Committee, described Comptroller Williams' proposed amendment as "*giving some additional powers* to the small banks to act as agents in insurance." *Id.* at 11,153 (emphasis added). Nowhere in the legislative history is there any reference to a Congressional intent to bar or limit powers already authorized under section 24 (Seventh).

## IV. THE COURT OF APPEALS' DECISION SUBJECTS NATIONAL BANKS TO SIGNIFICANT COMPETITIVE INEQUALITIES

The Second Circuit's decision places national banks at a significant competitive disadvantage to state banks, savings and loan associations, and other financial institutions that are able to offer various types of insurance

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*Life Ins. Co.*, 786 F. Supp. at 641 (legislative history indicates section 92 proposed to provide additional source of revenue).

[36] The Second Circuit's heavy reliance on Comptroller William's letter as "provid[ing] evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance," plainly is misplaced. App. at 13a. As the OCC explained in promulgating its regulations governing the sale of credit life insurance by national banks, "[a]lthough the Comptroller assumed in requesting [the enactment of section 92] that national banks lacked incidental power under 12 U.S.C. 24 (Seventh) to act as a full scale insurance agent . . . neither the language nor the legislative history of the section suggests that national banks would not possess ample authority under the incidental powers clause of 12 U.S.C. 24 (Seventh) to provide [credit life insurance]." 42 Fed. Reg. 48,518 (1977).

products.[37] Substantial competitive disruptions may occur as a result of the conflict among the courts of appeals produced by this decision. National banks located in states outside of the Second Circuit could continue to engage in insurance activities incidental to the business of banking, while national banks located within the Second Circuit would be precluded from engaging in such activities.

Moreover, all national banks will be significantly affected by the court of appeals' decision if the district court, which has been directed to enter summary judgment for ALTA, issues the nationwide injunction against the OCC requested in ALTA's complaint. For example, national banks currently engaged in the sale of credit life insurance, municipal bond insurance, and annuities will be faced with significant uncertainty as to the continuing legality of these activities. It is unlikely that national banks seeking to obtain the Comptroller's approval to offer such products would be able to obtain that approval.

The increasing competition posed by nonbank financial institutions to the banking industry dictates that national banks not be judicially restrained from exercising the full range of their available statutory powers. To deny national banks the power to engage in those insurance-related activities that the OCC reasonably has determined are incidental to the business of banking will eliminate important business opportunities and thereby diminish

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[37] *See* Comptroller Interp. Letter No. 368, [1985-87 Transfer Binder], Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,839 (July 11, 1986) (noting savings and loan associations are authorized to act as agents in sale of title insurance); *State Bank Powers*, Banking Pol'y Rep., June 1, 1992, at 4 (fifteen states permit state banks to engage in insurance activities); Ford Barrett, *Remarks to the Third Annual Banks in Insurance Conference, reprinted in* 6 OCC J., at 36-37 (Mar. 1987) (several major insurance companies not only provide banking services, but actually own banks).

significantly national banks' ability to compete profitably in today's extremely competitive financial services marketplace. Review of a decision having such an effect is clearly warranted.

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1992

# APPENDICES

## APPENDIX A

## OPINION OF THE COURT OF APPEALS

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## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

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AMERICAN LAND TITLE ASSOCIATION,
NEW YORK STATE LAND TITLE ASSOCIATION,
*Plaintiffs-Appellants,*

-v.-

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States, Defendants-Appellees, THE CHASE MANHATTAN BANK, N.A.,
*Intervenor-Defendant-Appellee.*

Docket No. 91-6235

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January 7, 1992, Argued and submitted

June 15, 1992, Decided

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JUDGES: Before: OAKES, Chief Judge, MESKILL and PRATT, Circuit Judges.

OPINION BY: OAKES

OPINION: OAKES, Chief Judge:

The issue in this appeal is whether two provisions of the National Bank Act, 12 U.S.C. §§ 92 and 24 (Seventh) (1988), permit national banks to engage in the title insurance agency business.

I.

Appellants the American Land Title Association and the New York State Land Title Association (collectively

ALTA), brought suit in the United States District Court for the Southern District of New York against appellees Robert L. Clarke, in his official capacity as Comptroller of the Currency, and the Office of the Comptroller of the Currency (collectively OCC), seeking declaratory and injunctive relief that would, *inter alia*, void a June 1989 OCC decision permitting The Chase Manhattan Bank, N.A. (Chase Manhattan) to engage in the title insurance agency business, and would direct the OCC to refrain from authorizing any other national bank from engaging in this business. Chase Manhattan subsequently intervened as a party defendant (OCC and Chase Manhattan are collectively referred to as OCC).

The OCC rendered the decision at issue in its role as regulator of national banks and administrator of national banking laws. The decision authorized Chase Manhattan to proceed with its proposal to establish two operating subsidiaries designed to sell title insurance, as agents, to borrowers and lenders in connection with real estate loans made by the bank and its affiliates. The proposal further provided that borrowers would not be obligated to buy title insurance through the subsidiaries, and a borrower's failure to use the subsidiaries would not affect Chase Manhattan's other dealings with the borrower. The OCC based its decision on an interpretive letter issued in 1986, OCC Staff Interpretive Letter No. 368, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,836 (July 11, 1986), that allowed a national bank to act as agent in the sale of title insurance.

Mary Johnson Lowe, *district judge*, denied ALTA's motion for summary judgment and granted the OCC's motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. ALTA now appeals. For the reasons set forth below, we reverse.

## II.

### A. Validity of 12 U.S.C. § 92

We note at the outset the existence of some question, dating back at least to the 1950s, regarding the validity of 12 U.S.C. § 92. This question arose because in 1918, two years after section 92 was enacted, a revision and reenactment of section 5202 of the Revised Statutes of the United States omitted section 92. Neither the OCC nor ALTA are troubled by this issue. The Supreme Court, albeit in dicta, has mentioned that section 92 was omitted from the 1918 enactment but assumed it remained valid. *Commissioner v. First Sec. Bank of Utah*, 405 U.S. 394, 401 n.12 (1972). Even Congress must have thought the provision valid because in Pub. L. No. 97-320, § 403(b); 96 Stat. 1469, 1511 (1982), it enacted an amendment to section 92 striking out some of its language. But the D.C. Circuit recently saw fit to add a new layer to this debate by declaring, sua sponte, that "section 92 has ceased to exist." *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992). Thus, we feel compelled to address this issue even though the parties neither briefed nor argued it.

Section 92 was enacted in 1916 as an amendment to section 13 of the Federal Reserve Act of 1913, Pub. L. No. 63-43, § 13, 38 Stat. 251, 263-64 (1913). Pub. L. No. 64-270, § 92, 39 Stat. 752, 753 (1916). The relevant portions provided as follows:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

. . . .

"That in addition to the powers now vested by law in national banking associations . . . any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life, or other insurance company. . . ."

In 1918, Congress enacted the War Finance Corporation Act of 1918, Pub. L. No. 65-121, 40 Stat. 506 (1918). In Title I, Congress created the War Finance Corporation and detailed its structure and powers. The final section of Title I—section 20—provides, in it entirety:

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"*Sec. 5202.* No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

> "Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> "Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.
>
> "Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.
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> "*Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act.*" (Emphasis added.)

The italicized portions indicate the additions to section 5202 effected by the War Finance Corporation Act. Obviously, Congress omitted the remaining provisions of section 5202 that, in the Act of 1916, had followed immediately after the provision entitled "Fifth"—including the text of section 92.[1]

Contrary to the view of the D.C. Circuit, we believe that this omission was inadvertent and thus we do not interpret it as having effected a repeal of section 92. Congress did not expressly repeal section 92 when it enacted the War Finance Corporation Act. We recognize, however, that an amendment to a statute that omits certain provisions almost always reflects Congress' intent to repeal the omitted provisions. However, just as we do not blindly give effect to an express repeal of a statute, *see In re Adamo*, 619 F.2d 216, 222 (2d Cir.) (express repeal of statutory provision not given effect because to do so would enforce an obvious mistake and contravene both common sense and statutory purpose), *cert. denied*, 449 U.S. 843 (1980), we do not necessarily give effect to an omission. Indeed, "the rule that amendment 'to read as follows' repeals everything omitted" is only an "aid[] in the interpretation of statutes, not [a] syllogism[]. [It] must yield

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[1] Indeed, the omission is reflected in the United States Code, which labels 12 U.S.C. § 92 "[o]mitted."

where [its] application would be inconsistent with the purposes of the statute." *FTC v. Standard Motor Products, Inc.*, 371 F.2d 613, 617 (2d Cir. 1967); see also *S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 & n.8 (maxims of statutory construction are but aids to interpretation).

Thus, we next consider the purpose of the War Finance Corporation Act in general, and section 20 in particular. The text and its legislative history indicate that the purpose of the Act was to ensure that sufficient capital flowed to industries deemed necessary to the prosecution of World War I. As stated by then Secretary of the Treasury, W. G. McAdoo, in a written statement presented before the Senate Committee on Finance and included in the Senate Report, S. Rep. No. 286, 65th Cong., 2d Sess. 4 (1918):

> The bill is purely a war measure designed to conserve the supply of labor and materials for the purposes of the war, and to help supply the war's financial requirements, and to give them a first claim on capital seeking investment in like manner as the war's material requirements have been given a first claim on production.

Congress sought to achieve this purpose by creating two institutional mechanisms: a War Finance Corporation and a Capital Issues Committee.[2] Among other things, the Act empowered the War Finance Corporation to make advances to banks who had loans outstanding to, or had purchased the bonds of, entities "whose operations shall be necessary or contributory to the prosecution of the war." War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 7, 40 Stat. 506, 508 (1918). Thus, Congress in-

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[2] The Capital Issues Committee, whose functions were set forth in Title II, was designed to regulate the sale of new issues of securities. War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 203, 40 Stat. 506, 513 (1918).

tended the War Finance Corporation to serve as a conduit for channelling funds, generally via banks, to war industries.

That successful prosecution of the war was the sole purpose of the War Finance Corporation Act is underscored by the fact that it was a temporary measure. Section 1 provided that the Corporation's powers would terminate (with the exception of powers incidental to its liquidation and winding up), and section 206 provided that Title II would continue in effect only until, six months after the end of the war, with such date to be fixed by the President. Thus, the entire enactment was drafted to be virtually self-destructing.

We next focus on the purpose of section 20 of the War Finance Corporation Act, and begin with its legislative history. Section 20 was offered on the floor of the House by Representative Michael F. Phelan of Massachusetts during consideration of the House version of the bill, H.R. 10608, 76 Cong. Rec. 3804 (1918). The only explanation of the amendment was offered by Representative Claude Kitchin, who stated:

> If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of the national banks from helping out these corporations.
>
> . . . .
>
> I think there were some of the committees that had this amendment under consideration and thought that this section of the Revised Statutes should not apply to this limitation.

*Id.* (statement of Rep. Kitchin). The amendment was agreed to without debate, and the House adopted its version of the bill.

The House bill and the Senate version, S. 3714, were then reconciled by a conference committee, which settled

on a version that included section 20. The House conference report, H.R. Conf. Rep. No. 448, 65th Cong., 2d Sess. 19 (1918) (Statement of Managers), explained the effect of section 20 as follows:

> This section provides that section 5202 of the Revised Statutes of the United States relating to the indebtedness of a national banking association shall not apply in the case of any liability incurred by such association under the provisions of the War Finance Corporation Act. This provision does not appear in the Senate Bill. The conferees adopt the House section.

When the Senate version of this conference report, S. Doc. No. 211, 65th Cong., 2d Sess. (1918), was submitted to the Senate by Senator Simmons, the Senator explained the significant amendments incorporated from the House version of the bill, but he did not address the addition of section 20. 76 Cong. Rec. 4376-79 (statements of Sen. Simmons). Ultimately, both the Senate and House agreed to enact the conferees' version of the bill.

No mention of the insurance powers of national banks exists in the legislative history. Thus, the legislative history indicates that the sole purpose of the revision was to ensure that section 5202 did not apply to liabilities incurred by a national bank in connection with the War Finance Corporation.

This view of the purpose of section 20 is supported by the text of the provision, which shows that the only substantive addition to the existing version of section 5202 was the following paragraph: "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act." In sum, it is obvious from a reading of both section 20 in its entirety, and its legislative history, that the amendment was designed to further the general purpose of the Act by ensuring that national banks could obtain funds from the War Finance Corporation without

running afoul of the requirement, contained in the opening paragraph of section 5202, that certain bank liabilities not exceed the capital requirements set forth in the section.

Given the purposes of the Act as a whole and section 20 in particular, we believe that Congress did not intend to alter the insurance agency powers of national banks when it enacted section 20. First, on a general level, it would be wholly incongruous for Congress to repeal a provision regarding the totally unrelated matter of insurance agency powers in an emergency measure directed at winning the war. Second, on a more specific level, it is highly unlikely that Congress' intent to render existing limits on national bank liabilities consistent with the operations of the War Finance Corporation would just happen to coincide with an intent to repeal provisions regarding national banks' insurance agency powers. Third, we cannot believe that Congress intended to make permanent changes to national banks' insurance agency powers in an act that by its terms would virtually self-destruct six months after the conclusion of the war. Fourth, if it actually was Congress' intent to effect such a permanent change to an unrelated area of law, we would expect some clue to this intent to appear somewhere in the legislative history, but we have searched it and it does not. Fifth, it would be—at least arguably—inconsistent for Congress to repeal a provision that, as we explain below, bars national banks in large towns from engaging in insurance agency activity when the primary purpose of Title I of the War Finance Corporation Act was to orient national bank activity toward financing war industries.

We also note that the structure of section 20 supports our view that section 92 was inadvertently omitted. The omission occurs precisely after the insertion of the new paragraph entitled "Sixth"—the provision that rendered the War Finance Corporation Act consistent with exist-

ing national banking law. This gives rise to the inference that the drafters of section 20 forgot to include the remainder of section 5202 after they inserted the new paragraph.

For these reasons, we believe the only rational interpretation of the words "amended so as to read as follows" is that, contrary to the general rule, they do not effect a repeal of 12 U.S.C. § 92. Thus, section 92 remains valid law. We now turn to the issues raised by the parties.

B. Standard of Review

ALTA first questions the district court's application of the principles of deference to agency action set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), because the OCC's decision to permit Chase Manhattan to sell title insurance took the form of an interpretive ruling rather than a regulation, as was the case in *Chevron*. We disagree. An OCC ruling interpreting a statute that it is charged with enforcing is entitled to deference in accordance with *Chevron*. *See, e.g., Clarke v. Securities Indust. Ass'n*, 479 U.S. 388, 403-04 (1987) (citing Chevron with approval and deferring to the Comptroller's interpretation of the National Bank Act, given that the provision in question was ambiguous and the Comptroller's interpretation was reasonable); *see also Securities Indust. Ass'n v. Clarke*, 885 F.2d 1034, 1042 (2d Cir. 1989) (acknowledging applicability of principles of deferential review to Comptroller's decision), *cert. denied*, 493 U.S. 1070 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 280-81 (D.C. Cir. 1988). Thus, the test set forth in Chevron is fully applicable to the OCC decision at issue in this case.

Under *Chevron*, we must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron* 467 U.S. at 842. If, however, the statute is

"silent or ambiguous with respect to the specific issue," *id.* at 843, then we will uphold the OCC's interpretation provided it is reasonable and not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

C. Section 92

ALTA argues that the district court erred in upholding the OCC's view that 12 U.S.C. § 92 places no limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh). ALTA contends that section 92 impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants.

To determine the scope of section 92, we turn first to the relevant statutory language:

> That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company. . . .

This provision obviously provides no explicit limitation on national bank activity. But the maxim of *expressio unius est exclusio alterius*, used as an aid to construction, leads to the conclusion that Congress intended to prohibit national banks located and doing business in towns with *over* 5,000 inhabitants from engaging in the insurance agency business. *See, e.g., Water Transp. Ass'n v. ICC*, 722 F.2d 1025, 1029 (2d Cir. 1983). Applying this principle, had Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have lim-

ıted the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants. And if at the time of enactment Congress believed that all national banks—regardless of location—already possessed the authority to sell insurance, this provision would have been superfluous. Thus, we believe that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents.

This statutory construction, of course, would have to "yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). But here, the legislative history lends support to our view of the statute. Although the legislative history of section 92 is sparse, two documents in particular shed light on the backdrop to Congress' enactment of this legislation in September 1916. The first document, published by the Federal Reserve Board in February 1916, is a letter from its counsel to the Governor of the Federal Reserve Board, opining that the insurance business did "not come within either the expressed or implied powers of national banks." 2 Fed. Res. Bull. 73, 74 (Feb. 1916). The letter concluded with the following statement: "Any such extension of the powers of national banks must be left to the consideration of Congress." *Id.*

The second document is a June 1916 letter from the then Comptroller of the Currency, John Skelton Williams, to the Senate Banking Committee, in which he proposed an amendment to the National Bank Act. 53 Cong. Rec. 11001 (1916). In the letter, the Comptroller explained that "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." *Id.* Enclosed with the letter was a draft of a proposed amendment "designed to empower national banks located in towns of not over 3,000 population . . . to act as agents for the placing of insurance

policies." *Id.* The Comptroller explicitly stated that "from the standpoint of public policy and banking efficiency this authority should be limited to banks in small communities." *Id.* This letter was entered into the Congressional Record by the Chairman of the Senate Banking Committee, Sen. Robert L. Owen. *Id.* The Comptroller's amendment was ultimately enacted, albeit with the modification that national banks in towns with populations up to 5,000 could sell insurance. *Id.* at 11153.

These two documents indicate that when Congress enacted section 92, it did so in the belief that under existing banking law (specifically 12 U.S.C. § 24 (Seventh)) national banks had no authority to engage in insurance agency activities. Furthermore, the Comptroller's letter provided evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance. Accordingly, the legislative history supports our construction of the statute.

Our view of the statute derives further support from *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968). In *Saxon*, the court relied on section 92 to declare unlawful Comptroller Saxon's ruling that permitted a national bank to sell its borrowers "broad forms of automobile, home, casualty and liability insurance." *Saxon*, 399 F.2d at 1012. The court applied the principle of *expressio unius est exclusio alterius*, and analyzed the legislative history to interpret section 92 such that "national banks have no power to act as insurance agents in cities of *over* 5,000 population." *Id.* at 1013.

The OCC contends that *Saxon* is irrelevant to the issue before us.[3] The OCC attempts to distinguish *Saxon* on the ground that it did not involve a form of insurance, like title insurance, that is essential to a bank's ability to

[3] The OCC also contends that Saxon was wrongly decided. We disagree.

provide financing. The *Saxon* court, however, did not rest its decision on the nature of the insurance activities engaged in by the bank. Instead, as we have stated, it simply viewed section 92 as an expression of Congress' intent that "national banks have no power to act as insurance agents in cities of *over* 5,000 population." *Id.* at 1013.

The OCC also urges us to disregard *Saxon* because the D.C. Circuit in *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), followed a different approach to interpreting section 92. The *Heimann* court held that section 92 did not bar a national bank from selling credit life insurance in a town with over 5,000 inhabitants. *Id.* at 1170. Although the court stated in a footnote that "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies," *id.* at 1170 n.18, it seems to have based its decision largely on the nature of credit life insurance rather than on the issue of whether section 92 impliedly operates as a bar to certain national bank activity. Thus, we see no reason to depart from our view of section 92.

Having determined that section 92 impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general, we must now decide whether this prohibition applies to title insurance activities in particular. Section 92 applies to national banks that "act as the agent for *any* fire, life, or *other* insurance company." 12 U.S.C. § 92 (emphasis added). We believe that this language makes inescapable the conclusion that Congress intended this provision to apply to "any . . . insurance company," and a title insurance company surely is an insurance company. *Id.* Thus, section 92 impliedly bars national banks from engaging in the title insurance agency business.

The OCC again relies on *Heimann*, asserting that, like credit life insurance, title insurance activities are outside

of section 92's limits on national bank activity. In upholding the OCC regulations at issue in Heimann, the court reasoned that "[u]nlike other forms of insurance coverage . . . credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business." *Heimann*, 613 F.2d at 1170.

*Heimann*, however, does not persuade us that section 92 is inapplicable to a national bank's title insurance activities. First, as the *Heimann* court pointed out, credit life insurance is unique in that it protects only the lender's interest by insuring that his loan will be repaid even if the borrower dies. When a bank sells credit life insurance, it is similar to the bank demanding a higher price for the loan to compensate for its assumption of a risk inherent in any extension of credit made pursuant to a borrower's promise to pay—the risk that the borrower's death will render him personally incapable of repaying the loan. Title insurance, by contrast, insures the borrower's equity in the property as well as the bank's interest in the mortgage it holds. Second, *Heimann's* persuasiveness is further eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history. Thus, *Heimann* is not dispositive of section 92's bearing on a national bank's power to sell title insurance.

D. Section 24 (Seventh)

In addition to the express powers granted national banks by the National Bank Act, Section 24 (Seventh) of the Act grants them "all such incidental powers as shall be necessary to carry on the business of banking." The OCC contends that under judicial interpretations of this provision, a bank's sale of title insurance, as agent, is "incidental" to the banking business within the meaning of section 24 (Seventh), and thus the OCC's decision is consistent with the National Bank Act.

Based on our interpretation of section 92, we see no need to determine the scope of section 24 (Seventh). We

are guided by the principle that where two statutes conflict, the statute that addresses the matter under consideration in specific terms controls over one that does so in a general manner, unless of course Congress has manifested a clear intent to the contrary. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). We discern no evidence that Congress intended section 24 (Seventh) to control section 92. Thus, even if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the specific limits on insurance activity contained in section 92. For this reason, we do not decide whether the title insurance agency business is "incidental" to banking within the meaning of section 24 (Seventh).

## III.

Because we find that section 92 prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business, we reverse the judgment of the district court and direct it to enter summary judgment for the appellants. To defer to the OCC in this case would flout Congressional intent—something we remain unwilling to do.

Reversed.

## APPENDIX B

## OPINION OF THE DISTRICT COURT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 CIV. 6939 (MJL)

AMERICAN LAND TITLE ASSOCIATION and
NEW YORK STATE LAND TITLE ASSOCIATION,
*Plaintiffs*,

-v.-

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an Agency of the United States,
*Defendants*,

and

THE CHASE MANHATTAN BANK, N.A.,
*Intervenor-Defendant*.

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OPINION AND ORDER

(Filed Aug. 7, 1991)

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MARY JOHNSON LOWE, D.J.

Before this Court is plaintiffs' motion pursuant to Fed. R. Civ. P. 56 for summary judgment. Defendants cross-move for dismissal under Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, defendants' motion is granted and plaintiffs' motion is denied.

### BACKGROUND

The OCC is the federal agency charged with the supervision and regulation of national banks and the administration of the National Bank Act of 1864 (the "NBA").

12 U.S.C. §§ 1 et seq. National banks are permitted to engage in their authorized activities through operating subsidiaries, and the provisions of the Federal banking laws are applicable to those operating subsidiaries. 12 C.F.R. § 5.34(d)(1) requires a national bank to notify the Deputy Comptroller in the appropriate district when it proposes to perform new activities through such an operating subsidiary. The Deputy Comptroller must then review the proposal in order to determine whether or not the new activities are within the scope of a national bank's legally permissible activities. 12 C.F.R. § 5.34(d) ii.

Pursuant to the above rules, on March 3, 1989, Chase Manhattan, a national banking association subject to the NBA, notified the OCC that it intended to establish two operating subsidiaries to engage in the business of issuing title insurance. Chase Manhattan, through the subsidiaries, wished to sell title insurance, as agent, to owners and lenders in connection with residential and commercial real estate loans made by the bank and its affiliates.[1] Under Chase Manhattan's proposal, the subsidiaries would perform certain services, including reviewing title abstracts, obtaining updated abstract and title opinions, preparing preliminary and final title insurance commitments on behalf of insurers and providing clerical assistance incidental to the subsidiaries' activities.

The bank outlined the proposed procedures for issuing title insurance as follows:

1. there would be no obligation on the part of the borrowers to use the services of the subsidiaries;

2. the lender's decision to grant or deny a mortgage would not be affected by whether a borrower chose to purchase title insurance from the bank;

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[1] Chase Manhattan requires customers to obtain title insurance as a condition to obtaining mortgage loans in order to protect the lender's security interest in the mortgaged property.

3. no preferential treatment would be accorded to customers who chose to obtain title insurance through the bank, and;

4. customers would be advised of the services offered by the subsidiaries and of the relationship between the lender and the subsidiaries.

The proposed plan would include procedures that would guarantee the subsidiaries' compliance with all federal and state laws and regulations applicable to title insurance activities.

By letter dated June 20, 1989, the Comptroller approved Chase Manhattan's proposal. In granting approval, the Comptroller relied upon two provisions of the Act: 12 U.S.C. § 24 (Seventh)[2] and 12 U.S.C. § 371.[3] The Comptroller specifically found that title insurance falls within the incidental powers of a national bank, noting that title insurance agency activities are both convenient and useful to the bank's express power to make real estate loans and that there has been judicial recognition that certain forms of insurance related to traditional lending activities of banks are within the incidental powers of a bank.

Plaintiffs challenge the validity of the Comptroller's ruling. They argue that the sale of title insurance is outside the scope of authority conferred on national banks by the NBA, and is contrary to judicial precedent. They contend that 12 U.S.C. § 92, which permits national banks doing business in towns with populations of less than 5,000 to "act as the agent for any fire, life, or other insurance company," prohibits national banks in larger

[2] 12 U.S.C. § 24 (Seventh) provides, in pertinent part, that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."

[3] 12 U.S.C. § 371 expressly authorizes national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interest in real estate."

towns from engaging in the business of title insurance. In essence, plaintiffs seek a declaratory judgment that the Comptroller acted outside of his scope of authority and contrary to the NBA when he granted approval to Chase Manhattan to operate subsidiaries engaged in the business of issuing title insurance.

Defendants ask that the Court uphold the Comptroller's ruling that title insurance activities are not prohibited by 12 U.S.C. § 92, are related to the traditional lending powers of banking, are incidental to the business of banking and therefore fall within the meaning of the incidental powers clause of the NBA. They argue that § 92 relates only to the sale of traditional insurance, which is substantially unlike title insurance. Finally, defendants argue that the Comptroller's decision to authorize the sale of title insurance by national banks and their subsidiaries must be accorded great deference by this Court, as this Court is reviewing an agency's interpretation of its governing statute.

## DISCUSSION

### I. *Decision of the Comptroller*

In a letter dated June 20, 1989, Senior Deputy Comptroller J. Michael Shepard approved Chase Manhattan's application to operate a subsidiary engaged in the business of title insurance activities. Mr. Shepard relied on OCC Interpretive Letter #368, dated July 11, 1986 which concluded that national banks are authorized to act as agents for the sale of title insurance. In Letter #368, in analyzing the incidental powers clause, the Comptroller discussed two tests the courts have used when determining whether a given activity is incidental within the meaning of 12 U.S.C. § 24. Letter #368 at 77,838.

### A. *The Defendants' Arguments*

First, under *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972), an activity has been defined as incidental to the business of banking if it is "convenient or

useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Id.* at 432. *See also, M & M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1972); *Guaranty Mortg. Co. v. Z.I.D. Associates*, 506 F. Supp. 101 (S.D.N.Y. 1980). Second, the Comptroller has found that an activity is incidental to the business of banking where the activity in question is similar to a permitted activity. *See e.g., Independent Bankers Assoc. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979) *cert. denied*, 449 U.S. 823 (1980). Although the OCC views the *Arnold Tours* test as too restrictive (and has maintained this position since the issuance of Letter #368: *See e.g., American Ins. Assoc. v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988); *Securities Industry Assoc. v. Clarke*, 885 F.2d 1034, 1048 (2d Cir. 1989)) it found that under either the "convenient and useful" or the "similar to a permitted activity" test, title insurance activities are incidental to the business of banking.

The Comptroller found that title insurance meets the *Arnold Tours* test in that it is convenient and useful in connection with making real estate loans, an express power granted to national banks. 12 U.S.C. § 371. The Comptroller observed that banks often require title insurance coverage to protect against contingencies that would prevent the bank from being able to foreclose on the collateral. He noted that it would be both convenient and useful for borrowers to discuss and purchase title insurance coverage while negotiating a real estate loan. The Comptroller clearly views title insurance as a logical compliment to the review of abstracts of title, legal title opinion, and title insurance commitments already conducted by banks in connection with making real estate loans. Similarly, every loan made by a bank that is collateralized by a parcel of real estate is conditioned on an examination of the relevant land records. National lenders who make real estate loans regard title policy as an

essential part of their loan package, helping them to transfer these loans as they would other commercial property. Powell on Real Property, ¶ 1028 at 92-3.

Furthermore, title insurance is a contract under which the insurer indemnifies the insured for a specific amount against any loss through then existing defects in title. Powell on Real Property, ¶ 1029 at 92-5-29-7. The lender's policy protects the lender's interest in that it insures a valid enforceable lien in the event of a default. In this sense, the Comptroller found that title insurance is similar to an extension of credit, a traditional bank function. Banks frequently prepare and review abstracts of title and legal title opinions concerning mortgaged real property. In this respect, the Comptroller concluded that title insurance, like credit life insurance, is a limited type of coverage similar to a traditional bank practice connected to an extension of credit and therefore, incidental to the business of banking.

A similar position was adopted by the D.C. Circuit in *Independent Bankers Assoc.*, 613 F. 2d 1164. There the court observed that credit life insurance (which includes health, accident and life insurance issued as protection for a loan) is essential where ordinary loans on personal security are made, is a limited type of coverage that protects loans, and is connected to an extension of credit. For these reasons, the court held that credit life insurance is incidental within the meaning of 12 U.S.C. § 24 (Seventh) *Id.* at 1170.

B. *The Plaintiffs' Arguments*

Plaintiffs rely on *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968), in which there was a dispute over a national bank's authority to issue broad forms of insurance. The *Saxon* court held that the Office of the Comptroller acted outside its scope of authority and contrary to § 92 when it granted national banks the very broad and unlimited

power to "act as agent in the issuance of insurance which is incidental to banking transactions."[4] *Id.* at 1012. However, in Letter #368, the Comptroller distinguished title insurance from the types of traditional insurance at issue in *Saxon*. He noted that title insurance is unique and unlike the broad forms of insurance activities regulated by 12 U.S.C. § 92 and therefore not barred by the *Saxon* decision. Title insurance differs from other forms of insurance since it insures title as of the date of the policy against loss by reason of situations arising out of past conduct. Powell on Real Property, ¶ 1030, at 92-7. There are no risks insured based on actuarial computations of future probabilities, as in most forms of insurance. In this respect, title insurance is similar to municipal bond insurance, an insurance activity that has been held to be incidental to the business of banking and not prohibited by 12 U.S.C. § 92 *See, e.g., American Ins. Ass'n v. Clarke*, 656 F. Supp. 404, 410 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988) (municipal bond insurance distinguished from other types of insurance based on the absence of actuarial computations in determining risk).

## II. SCOPE OF REVIEW

The principles regarding judicial deference to agency interpretation of its governing statute are outlined in *Chevron U. S. A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, (1984). In reviewing an agency made rule, the first issue the court must decide is whether Congress has addressed the specific ques-

[4] Pursuant to the OCC ruling at issue in *Saxon*, national banks began to engage in the business of broad forms of automobile, home, casualty and life insurance. *Id.* at 1012. The 5th Circuit, in determining whether the Comptroller had acted within the statute, read § 92 as an express limitation of the incidental powers granted by 12 U.S.C. § 24 (Seventh) by expressly authorizing the relevant insurance sales only in towns with populations of less than 5,000, and held that the OCC ruling was contrary to § 92. *Id.* at 1016.

tion at issue. If congressional intent is clear in the statute, the court must enforce that intent. If however, Congress has not addressed the specific question at issue, the court must determine whether the agency's ruling is based on a reasonable interpretation of that statute. In upholding an agency's decision "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted, . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. The agency interpretation is controlling unless it is "arbitrary, capricious or manifestly contrary to the statute." *Id.* at 844. These principles of judicial review of agency interpretation apply to the Comptroller's interpretation of the NBA. *American Insurance Assoc.*, 865 F.2d at 281; *Securities Industry Assoc.*, 885 F.2d at 1042. Thus, under the principles outlined in *Chevron* and its progeny, this Court must defer to the Comptroller's decision if it is rational and consistent with the statute.

Plaintiffs argue that the Comptroller's approval of the Chase Manhattan proposal violates the NBA and is not entitled to deference. In support, plaintiffs rely heavily on *Saxon*, 399 F.2d 1010, discussed *supra*. Plaintiffs argue that title insurance falls within the scope of § 92 and, inasmuch as Chase Manhattan has not indicated that it intends to limit its title insurance activities to towns with populations of less than 5,000, the Comptroller's approval of the Chase Manhattan proposal is contrary to the statute. 12 U.S.C. § 92.[5]

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[5] There is some dispute as to whether *Saxon* was correctly decided. *Independent Ins. Agents v. Board of Governors*, 736 F.2d 468, 477 n. 6 (8th Cir. 1984). However, whether or not *Saxon* was correctly decided, it does not control the outcome of the case at bar. As discussed, *supra*, *Saxon* involved national banks' authority to sell broad forms of automobile, home, casualty and liability insurance, activities *specifically prohibited* by the NBA (12 U.S.C. § 92). *Saxon*, 399 F.2d at 1012. As far as the instant case, the NBA does not

However, the Comptroller is entitled to "look beyond a label given a certain activity to determine whether or not it is permissible." *American Ins. Assoc.*, 656 F. Supp. at 408. The Comptroller is not precluded from determining that title insurance falls outside of the scope of activities discussed in § 92 even though it is labeled "insurance". This point is illustrated by the fact that courts have held in the past that various types of "insurance" are incidental to the business of banking and not prohibited by § 92. *See e.g., American Ins. Assoc.* 865 F.2d 278 (holding that Comptroller's determination that municipal bond insurance falls within the scope of the incidental powers clause is rational under the NBA) and *Independent Bankers Assoc.*, 613 F.2d 1170 (holding that Comptroller's finding that the sale of credit life insurance falls within the incidental powers clause is rational under the NBA).

III. The Conclusion of This Court

As noted above, 12 U.S.C. § 24 (Seventh) grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." This clause has been broadly construed to include activities which are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *M & M Leasing Corp.*, 563 F.2d at 1382.

Although the Comptroller argues that the *Arnold Tours* test, (used to determine whether a given activity is "incidental", discussed *supra*, at § I.A.) is unnecessarily restrictive, he has found that even under the *Arnold Tours* test, title insurance is incidental to the business of banking within the meaning of 12 U.S.C. § 24 (Seventh). As we agree that title insurance agency activities satisfy

specifically prohibit national banks from issuing title insurance, and Congressional intent is therefore unclear.

the requirements of the *Arnold Tours* test, we decline to address the Comptroller's position that the test is too restrictive.

Title insurance is commonplace where loans collateralized by a parcel of real property are made and has, in effect, become an essential element of the real estate package. Therefore, it is a rational conclusion that the sale of title insurance in connection with real estate loans made by a national bank is incidental to the express power of a national bank to make real estate loans. Further, it is rational to conclude that title insurance, like credit life insurance, is an activity considered incidental to the business of banking in that it is a limited type of coverage that protects the lender in the event of a default.

We find that it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision, not a limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh). Further, even if § 92 were viewed as a limitation, we find that the Comptroller's determination that title insurance is so significantly different from the broad forms of insurance addressed in § 92 as to remove title insurance from the scope of § 92 is rational under the NBA.

The question before this Court is not whether the NBA expressly authorizes national banks to engage in the business of title insurance agency activities. Rather, the question is whether the Comptroller's determination that a bank may engage in the business of title insurance agency activities is rational under the NBA. The Comptroller determined that the activities proposed by Chase Manhattan are incidental to banking business in that they are convenient and useful in connection with its express power to make real estate loans and that they are similar to an extension of credit, an activity already performed and permitted. As the Comptroller's determination was neither erroneous nor arbitrary or capricious, this Court

will not disturb it. Therefore, defendants' motion to dismiss is granted and plaintiffs' motion for summary judgment is denied.

It Is So Ordered.

/s/ Mary Johnson Lowe
United States District Judge

Dated: July 31, 1991
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civil 6939 (MJL)

AMERICAN LAND TITLE ASSOCIATION and
NEW YORK STATE LAND TITLE ASSOCIATION,
*Plaintiffs,*

-against-

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an Agency of the United States,
*Defendants,*

and

THE CHASE MANHATTAN BANK, N.A.,
*Intervenor-Defendant.*

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JUDGMENT

[Filed Aug. 15, 1991]

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Plaintiff having moved pursuant to F.R.Civ.P. 56 for summary judgment, defendants having cross-moved for dismissal under F.R.Civ.P. 12(b)(6), and the said motions come before the Honorable MARY JOHNSON LOWE, U.S.D.J., and the Court thereafter on August 7, 1991, having handed down its opinion and order (#68481); denying plaintiffs' motion for summary judgment, and granting defendants' motion to dismiss, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiffs' motion for summary judgment be and it is hereby denied, and it is further,

ORDERED, that defendants' motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed.

s/ James M. Parkinson
Clerk

DATED: New York, New York
August 15, 1991

## APPENDIX C

### OCC APPROVAL LETTER

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Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

June 29, 1989

Mr. Thomas C. Lynch
Executive Vice President
Chase Manhattan Bank, N.A.
1 Chase Manhattan Plaza
New York, New York 10081

Dear Mr. Lynch:

This letter is in response to your notice of March 3, 1989, advising the Office of the Comptroller of the Currency ("OCC") that Chase Manhattan Bank, N.A. ("Bank"), intends to establish two *de novo* operating subsidiaries ("Subsidiaries") to sell title insurance as agent to owners and lenders in connection with residential and commercial real estate loans made by the Bank and its affiliates.

The Subsidiaries will be established pursuant to 12 C.F.R. § 5.34, and will be incorporated in Delaware. One subsidiary will be located at an office of a home mortgage affiliate of the Bank, the other will be located at an office of the Bank. Initially, the Bank will own 100 percent of the voting stock of the Subsidiaries, but may sell up to 20 percent of each subsidiary's stock to an unaffiliated third party. As required by 12 C.F.R. § 5.34(e), the Bank will at all times retain ownership of at least 80 percent of the voting stock of each subsidiary.

It is anticipated that the Subsidiaries will obtain certain services by entering into agreements with entities unaffiliated with the Bank. These services may include reviewing abstracts of title, obtaining updated abstract

and title opinions, preparing preliminary title insurance commitments and final title insurance policies on behalf of insurers, and providing clerical assistance related to the Subsidiaries' title insurance agency activities.

It is also anticipated that the Subsidiaries will enter into agency agreements with one or more title insurance companies. Under these agreements, the Subsidiaries will retain a portion of the premiums paid on the title insurance policies they sell. You have stated that the Subsidiaries will comply with all federal and state laws and regulations applicable to their title insurance agency activities.

The Bank and its affiliates currently require customers to obtain title insurance as a condition to obtaining mortgage loans. This condition is imposed in order to protect the lender's security interest in the mortgaged property. Although the Bank and its affiliates will continue to require mortgagors to obtain title insurance, the Bank has assured the OCC that the following practices will be observed when offering title insurance through the Subsidiaries. Borrowers will be able to purchase title insurance from the insurer of their choice and will not be obligated to use the services of the Subsidiaries. Moreover, a lender's decision to grant or deny a mortgage will not be affected by whether a borrower has purchased title insurance sold by the Subsidiaries nor will a lender accord more favorable treatment to customers who elect to obtain title insurance through the Subsidiaries. Customers will be advised of the services offered by the Subsidiaries and the relationship between the lender and the Subsidiaries.

Discussion

Title insurance is limited purpose insurance designed to protect the owner of an interest in real estate against the risk of loss resulting from title defects or encumbrances on the property. Its development in the late 19th century is related to the mortgage lending activities of

banks and many title insurance companies were departments of banks and trust companies until the 1930s.

The OCC has issued an interpretive letter which concludes that national banks are authorized to act as agents for the sale of title insurance. *See* Letter No. 368,[1] *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986). That conclusion was based on the determination that selling title insurance is incidental to national banks' explicit authority to make, arrange, buy and sell mortgage loans under 12 U.S.C. §§ 24(7) and 371. *Id.* The conclusion also is supported by judicial recognition that it is incidental to banking, and therefore permissible, for national banks to sell forms of limited purpose insurance related to the traditional lending activities of banks. *See Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) (credit life insurance).

Your proposal is consistent in all material respects with the proposal which was approved in Letter No. 368. Since 12 C.F.R. § 5.34 permits a national bank to engage in any permissible activity through an operating subsidiary absent supervisory or regulatory concerns, the Bank may proceed with its proposal to establish operating subsidiaries to sell title insurance as agent.

Sincerely,

/s/ J. Michael Shepherd
J. MICHAEL SHEPHERD
Senior Deputy Comptroller
for Corporate and Economic Programs

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[1] The conclusion reached in Letter No. 368 has been challenged as improper rulemaking in *American Land Title Ass'n v. Clarke*, No. A87-CA-408 (W.D. Tx. filed July 8, 1987). The court has not yet ruled on the OCC's motion to dismiss nor issued any orders on other than procedural matters.

## APPENDIX D

## 1986 OCC INTERPRETIVE LETTER

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William B. Glidden, Assistant Director, Legal Advisory Services Division. Letter No. 368. July 11, 1986. Interpreting 12 U.S.C. § 24(7); 12 U.S.C. § 371.

This is in response to your request for an opinion as to whether your client, ("Bank"), or its operating subsidiary may perform certain activities related to the sale of title insurance. From correspondence and conversation with you, it is our understanding that the Bank is seeking permission to engage in the following three activities: to act as agent in the sale of title insurance, to enter into a percentage lease and employee sharing arrangement with a title insurance agency, and to acquire a franchise from a title insurance agency to prepare and distribute commitments and policies for title insurance.

In order not to delay any further our response, you agreed, in a discussion with Nancy E. Chase, an attorney with this Office, to limiting your request at this time to the first activity listed, with the Office giving you general information regarding the permissibility of engaging in the remaining activities. This procedure would avoid your supplying the Office with specific information regarding the contractual arrangements contemplated under the second two proposals—information that the Office would need in analyzing the activities and that Ms. Chase understood was not currently available.

### Background

Title insurance is a unique type of insurance. Its purpose is to reduce the risk of loss resulting from title defects or encumbrances existing on property at the time the policy is issued. It does not protect the insured from events that happen after the contract is written.

Title insurance can protect, generally through separate policies, both the owners of the property and the mort-

gagee. Different policy forms are required because an owner and a lender are exposed to somewhat different title risks. The owner's policy protects the ownership interest or right of possession in the property. Thus, it is ordinarily issued in an amount equal to the purchase price. The lender's policy protects the lender's security interest in the land securing the repayment of principal and interest. It ensures that the lien has been validly created by the owner of the mortgaged land, that it is enforceable in the event of default, and that the lien has the position of priority of claim on the land as shown in the policy. Consequently, the lender's policy generally covers only the amount of the mortgage loan outstanding.

Title insurance is written on an individual basis and in group or franchise form for the convenience of large users of title insurance policies, e.g., lending institutions. Group policies are simply facilitative arrangements under which a master policy is used to spell out the insurance clause and the various policy provisions. Each title or risk is then covered by a certificate, once the title insurer has had the opportunity to underwrite it. Group policies also are often used in connection with credit life insurance offered by a lender.

After application is made for title insurance, the first document the applicant and other interested persons receive is one which summarizes the underwriter's evaluation of title based on the search and examination of title. This document is commonly known as a title insurance commitment. Its function is to begin the sale or loan "closing" process.

In addition to summarizing the condition of title, the commitment provides a correct legal description of the land involved, identifies the specific form of policy or policies the insured is prepared to issue, the amount of insurance requested, the standard and special exceptions which will appear in the policy or policies (unless removed before closing) and, in most locations, a brief description of the legal instrument required to create the estate or

interest to be insured. The closing agent (an attorney, an escrow company, or an escrow department of a title company or bank) is responsible for coordination among the parties, compliance with all closing instructions received from the parties, proper handling of all legal documents and funds involved in consummating the transaction, and, finally, obtaining a title insurance policy for each party to be insured which complies in form and content with the previously established requirements of the insured.

You stated in your letter that as part of their ordinary duties when making loans secured by real property, loan officers of the Bank frequently have prepared and reviewed for them, or themselves review, abstracts of title and legal title opinions concerning the real property to be mortgaged. You observed that these duties are substantially identical to the duties performed by a title insurance company or agency when it prepares a title insurance commitment and policy.

Because of the importance to a bank of protecting its security interest in its mortgaged property, it is not surprising that banks and trust companies were closely associated with the title insurance business from its inception at the end of the nineteenth century until the Depression. See generally Smith, Evolution of the Title Policy, Title News (Feb. 1976). In discussing the relationship between the growth of the title insurance industry and the demand by lending institutions for insurance to protect real estate mortgage loans, H.M. Johnson, in his article "The Nature of Title Insurance," notes that the lending and insurance functions both were offered originally by banks: "At one time title insurance companies were departments in banking institutions, and their operations were an integral part of the money lending apparatus." See Johnson, The Nature of Title Insurance, 33 J. Risk & Ins. 393, 393 (1966). Likewise, in a book on title insurance, this combination of banking and title insurance is again mentioned: "The majority of

the early ventures into title insurance were made by banks and trust companies who combined the title insurance function with the lending of mortgage money." See Title Insurance Companies (Philo Smith publ.). See also Public Regulation of Title Insurance Companies and Abstracters 0.10.30. (Villanova Press, E.F. Roberts ed. 1961) ("Villanova Treatise").

The first title insurance policy was issued in Philadelphia in 1876 by the Real Estate Title Insurance and Trust Company. More title insurance companies were established soon thereafter "practically all of which consisted of title insurance departments of banks and trust companies." Villanova Treatise at 14 n.2. It is said that "within the following fifty years practically every bank and trust company in Philadelphia had its affiliated title department which examined and insured or guaranteed the title in real estate acquired with the bank's own funds or for the account of its trust estates or its customers." *Id.*

As a result of failure of banks and mortgage guarantee companies during the Depression, many title companies were divested and independent title companies involved only in the title insurance business were organized. Most states now restrict banks from engaging in title insurance, see Memorandum to Board of Governors of the Federal Reserve System from Federal Reserve Bank of Philadelphia (Aug. 31, 1973) (Provident National Corp. application to retain ownership of a title insurance company); however, corporations may still be formed in a number of states, including Oklahoma, to engage in both title insurance and trust business.[1] See Okla. Stat. Ann.

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[1] It is the position of the Office that since national banks are federal instrumentalities, federal law controls what insurance activities are permissible. Therefore, although the reach of the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., giving states the authority to regulate "the business of insurance" within their borders is somewhat uncertain, national banks would not be pro-

tit. 6, § 1001A(20) (West 1984). In addition, an operating subsidiary of a savings and loan association may act as an agent or broker for title insurance. See 12 C.F.R. § 545.74(c)(5)(ii).

Although title insurance companies now tend to be independent of banks, there remains a close relationship between certain banking functions and the title insurance business. For example, title insurance companies may perform functions similar to those of banks, such as dealing in mortgage loans, and, depending upon state law, acting as transfer agents and engaging in the trust business.

Furthermore, as mentioned above, title insurance is often purchased in conjunction with the granting of a mortgage loan. In addition to performing a credit analysis, a bank must review the title insurance documents prior to granting a loan to be sure that its security interest in the property will be protected. In cases where banks conduct "closings" for customers, review by the bank of title insurance policies takes on added importance since the bank also must confirm that the policy complies with the borrower's previously established requirements.

Thus, it is important for banks to be familiar with title insurance procedures in connection with their mortgage lending activities. The experience gained in reviewing title insurance documents gives national banks the expertise necessary to perform related agency activities. Although banks may have developed expertise in the title insurance business, the authority of national banks to act as agents in the sale of title insurance must also be established.

**Opinion**

The National Bank Act provides that national banks shall have the power:

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hibited from selling title insurance even if the activity is impermissible for state banks.

> To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security . . . .

12 U.S.C. § 24(7). Since national banks are not expressly authorized to sell title insurance, in order for them to engage in that activity, the activity must be incidental to the business of banking. Recently, the Court of Appeals for the First Circuit enumerated a test to be used in determining whether a given activity is incidental to the business of banking. In Arnold Tours, Inc. v. Camp, which invalidated an OCC interpretive ruling authorizing national banks to run travel agencies, the court stated that:

> [A] national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.

472 F.2d 427, 432 (1st Cir. 1972). Accordingly, under the Arnold Tours test, for an activity to be incidental to the business of banking, it must be connected to the performance by the bank of its express powers.

This office views the Arnold Tours test as too restrictive. Other courts have used broader and more realistic standards, such as finding the activity in question similar to a permitted activity and not prohibited by statute, Miller v. King, 223 U.S. 505 (1912); Wyman v. Wallace, 201 U.S. 230 (1906); finding that the banks have traditionally engaged in similar activities, Colorado National Bank v. Bedford, 310 U.S. 41 (1940); IBAA v.

Heimann, 613 F.2d 1164 (D.C. Cir. 1979); finding that the activity is useful and convenient to the bank in the current competitive climate, First National Bank v. Hartford, 273 U.S. 548 (1927); Colorado National Bank v. Bedford, supra; Franklin National Bank v. New York, 347 U.S. 373 (1954); or finding that the proposed service is a convenience to its customers, Clement National Bank v. Vermont, 231 U.S. 1290 (1913).

However, the Arnold Tours test has been cited with approval by courts in both the Second and Ninth Circuits. See National Retailer Corp. v. Valley National Bank, 590 F.2d 315 (9th Cir. 1979); M&M Leasing v. Seattle First National Bank, 563 F.2d 1377 (9th Cir. 1977); Guaranty Mortgage Co. v. ZID Associates, 506 F. Supp. 101 (S.D.N.Y. 1980).

By applying the several standards cited above, including the more restrictive Arnold Tours test, it can be concluded that the sale of title insurance by national banks in an agency capacity is incidental to banking under 12 U.S.C. §§ 24(7), 371.[2] As you may be aware, the Office has not in the past objected to national banks' offering title insurance as agents. However, the rationale for the Office's position has only been alluded to briefly in earlier opinion letters. Consequently, it is appropriate to set forth our reasoning in more detail at this time.

Pursuant to 12 U.S.C. § 371, national banks are expressly authorized to "make, arrange, purchase or sell

[2] It has been the longstanding position of the Office that a national bank which holds a group insurance policy is acting as a policyholder, not as an agent for the insurer. Consequently, if a bank offers group insurance related to bank loans, the activity is permissible under 12 U.S.C. § 24(7) and does not raise the legal concerns addressed in Saxon v. Georgia Association of Independent Insurance Agents, 399 F.2d 1010 (5th Cir. 1968). Therefore, the Bank may offer its customers title insurance coverage under a group policy arrangement where the Bank holds the master policy without concern for any possible inconsistency with 12 U.S.C. § 92 and the Saxon ruling.

loans or extensions of credit secured by liens on interests in real estate . . . ." Since banks make substantial loans on the security of the real property being purchased, it is important that banks ensure that they have a valid lien on the property that would not be affected by unknown encumbrances. A bank must rely on the integrity of its interest in the real property securing the mortgage loan should the borrower become unable to meet scheduled payments of principal and interest. To conform with prudent banking practices, banks often require title insurance coverage to protect themselves against contingencies that would prevent the bank from being able to foreclose on the collateral.

In addition, banks often sell, in the secondary market, the mortgage loans they have made. In order to provide for the saleability of these loans, banks generally require the borrower to obtain title insurance on the mortgaged property. Therefore, permitting national banks to act as agents in the sale of title insurance in connection with real estate loans made by the banks would be convenient and useful to the banks and to their customers. Title insurance is also important to bank customers to protect their own interests in the mortgaged property. It would be convenient and useful to the customers to be able to discuss title insurance coverage and purchase the policy at the same time the customer negotiates a real property loan at the bank.[3]

Furthermore, the convenience and usefulness of permitting the bank to conduct the agency activity is evident from banks' current involvement with title insurance policies. The agency activity would be merely an extension of or logical complement to the review of abstracts

[3] Arrangements under which banks are authorized both to make loans and offer insurance related to the credit may raise the issue of the potential for illegal tie-ins. It is the opinion of this Office that 12 U.S.C. § 1972 and Federal antitrust law are sufficient protection against this practice.

of title, legal title opinions, and title insurance commitments that banks conduct prior to granting a loan or conducting a closing for a borrower. Accordingly, banks already have the expertise to perform the agency activities and would be able to benefit financially from authorization to enter into agency relationships with title insurance companies and to collect commissions for performing the services.

In addition, banks traditionally have been involved in the title insurance business. Indeed, as discussed above, title insurance originated from and was offered in conjunction with the real estate lending activities of banks and trust companies from the 1870s until the Depression of the 1930s. In this respect, title insurance resembles credit life insurance, the sale of which was considered by the court in IBAA v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), to be a traditional bank practice connected to an extension of credit and, thus, a permissible bank activity.

Moreover, savings and loan associations are authorized by regulation to act as agents in the sale of title insurance. Authorizing the activity for national banks would enable them to compete in an increasingly competitive financial services market. The Office has recognized in its analyses of competitive markets when considering bank merger applications and in its review of state branching provisions when analyzing branch applications that savings and loans offer many of the same services and perform many of the same functions as national banks. In fact, commercial banks and savings and loans are the two largest providers of mortgage loans. See Fed. Res. Bull. A39 (Jan. 1986). Therefore, since national banks and savings and loan associations are increasingly servicing the same markets, national banks should not be disadvantaged as to savings and loans by being prohibited from selling title insurance.

Finally, title insurance, as pointed out above, is a unique form of insurance. It is sufficiently unlike life,

property, and casualty insurance to justify treating it differently from these forms of insurance for regulatory purposes. As a result, its specialized nature distinguishes it from the broad forms of insurance at issue in the Saxon case and brings it within the rationale applied to credit life insurance in IBAA v. Heimann.

Despite the persuasiveness of the incidental powers analysis under 12 U.S.C. §§ 24(7) and 371, the plaintiff in IBAA v. Heimann argued that Saxon stood for the proposition that national banks' incidental powers are limited to those permitted under 12 U.S.C. § 92. The court rejected this argument.[4]

In IBAA v. Heimann, the court expressly stated that the sale of credit life insurance is permissible under the incidental powers clause of 12 U.S.C. § 24(7) since it only serves to protect bank loans and its sale by banks is a traditional banking practice. See IBAA v. Heimann, 613 F.2d at 1168, 1170. Furthermore, the court pointed out that the Saxon opinion can be distinguished since Saxon involved the bank's authority to sell broad forms of automobile, home, casualty, and liability insurance, not, as in the case of credit life, "a limited special type of coverage written to protect loans." *Id.* at 1170.

Since title insurance is a specialized form of insurance traditionally offered by banks, is related to extensions of credit by a bank, and its sale does not involve a bank's acting as agent for broad forms of insurance products, the proposed activity is consistent with the principles enunciated in IBAA v. Heimann. Therefore, based on the opinion of the court in IBAA v. Heimann and for the reasons discussed above, it is my opinion that the Bank may act as agent in the sale of title insurance incidental

[4] A recent Eighth Circuit opinion suggested in a footnote that "there is a strong argument that Saxon was wrongly decided." See Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System, 736 F.2d 468, 471 n.6 (8th Cir. 1984).

to its express authority to make loans secured by real property. If the Bank intends to conduct the title insurance agency activities in an operating subsidiary, you should follow the notification procedures under 12 C.F.R. § 5.34 to inform the Office of such intent.

In regard to the remaining activities proposed in your request letter, I offer some suggestions which may be helpful in structuring the arrangements with an outside title insurance agency in such a way as to comply with the laws applicable to national banks. The Office would not object in principle to the Bank's performing the proposed clerical services. Such services, as you have described them, including obtaining an updated abstract and title opinion, noting exceptions and fulfilling requirements, or having requirements fulfilled, as set out in the title opinion, and preparing a preliminary title insurance commitment and a final title insurance policy, appear to be incidental to the functions involved in preparing loan documentation prior to closing on a mortgage loan. Certain additional issues may be raised, however, when the clerical services are performed in conjunction with other arrangements.

Under your second proposal, the Bank would enter into a percentage lease and employee sharing arrangement with a title insurance agency. As you mentioned in your letter, the Office has approved arrangements in which national banks lease excess office space to insurance agencies on a percentage lease basis. See Letter from Brian W. Smith, Chief Counsel (OCC Interpretive Letter No. 274, Dec. 2, 1983), reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,438. However, you should be aware that if the percentage required under the lease is unusually high, an inference of partnership may arise. This concern is discussed in Letter No. 274.

Also, since you state that the Bank will be performing clerical services for the title insurance agency in office

space leased to the agency by the Bank, a partnership or joint venture may be created if the persons performing the clerical services are considered to be dual employees of the Bank and the insurance agency. Although the Office has permitted national banks to engage in certain partnerships, such participation raises significant legal, policy, and prudential concerns. Thus, the Office would want to review the particular contractual arrangements prior to the Bank's beginning operations under the second proposal. I am enclosing an OCC opinion letter related to a percentage lease and employee sharing program to assist you in structuring your arrangement.

Your third proposal involves the Bank's acquiring a franchise from a title insurance agency to prepare and distribute commitments and policies for title insurance. The Office has not taken a position on whether national banks are authorized to enter into franchise agreements. However, since the term "franchise" seems to be used to describe various business arrangements, there does not appear to be a consistently applied definition on which to base an opinion that would be applicable in all cases. As a result, as you indicated in your letter, the exact nature of the franchisor/franchisee relationship must be determined on a case-by-case basis. Thus, if the Bank decides to enter into a franchise arrangement, the Office would also want to review the terms of the contract to determine if the arrangement would be permissible.

## APPENDIX E

### 1965 OCC INTERPRETIVE LETTER

---

[Name and address of addressee
redacted in publicly-available copy]

August 3, 1965

This will confirm the telephone conversation of July 22, 1965, between you and a member of our legal staff regarding your letter of July 2, 1965, in which you inquire whether the First National Bank, [name redacted in publicly-available copy of letter] may act as an agent for, or organize and have an interest in, a title insurance and abstract company. [Name of town redacted] according to the 1960 census, has a population of less than 5,000 persons.

Under 12 U.S.C. § 92, a National Bank is authorized to act as a general agent for any fire, life or other insurance company in any place the population of which does not exceed 5,000 inhabitants, according to the last decennial census. Accordingly, so long as the population of [name of place redacted] does not exceed 5,000, the First National Bank may act as a general agent in the issuance of title insurance. In addition, a National Bank, wherever located, may, under its corporate powers contained in paragraph Seventh of 12 U.S.C. 24, act as an agent in the issuance of title insurance which is incident to a banking transaction.

Very truly yours,

/s/ R. Coleman Egertson
Deputy Comptroller of the Currency

## APPENDIX F

## STATUTORY PROVISIONS INVOLVED

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### 12 U.S.C. § 21 (Seventh)

**Corporate powers of associations**

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * *

**Seventh.** To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. . . .

* * * *

**Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (1916).**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * * *

That section thirteen be, and is hereby, amended to read as follows:

"Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal reserve banks, and checks and drafts, payable upon presentation within its district, and maturing bills payable within its district.

"Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods,

wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days, exclusive of days of grace: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on livestock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

"The aggregate of such notes, drafts, and bills bearing the signature or indorsement of any one borrower, whether a person, company, firm, or corporation, rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

"Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount of not more than three months' sight, exclusive of days of grace, and which are indorsed by at least one member bank.

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document con-

veying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus.

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Porided, however*, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular possessions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board: *Provided, however*, That no member bank shall accept such drafts or bills of exchange referred to this paragraph for any one bank to an amount exceeding in the aggregate ten per centum of the paid-up and unimpaired capital and surplus of the accepting bank unless the draft or bill of exchange is accompanied by documents conveying or securing title or by some other adequate security: *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

* * * *

War Finance Corporation Act of 1918, ch. 45, 40 Stat. 506 (1918).

* * * *

SEC. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"SEC. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

* * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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THE CHASE MANHATTAN BANK, N.A.,
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v.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether national banks may engage in the title insurance agency business outside of the limitations established by Congress in 12 U.S.C. 92, the only statutory enactment to address the permissible scope of insurance agency activities by national banks?

## RULE 29.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Respondent American Land Title Association ("ALTA") is a non-governmental corporate body. ALTA is a non-profit corporation founded in 1907. It is organized and existing under the laws of the District of Columbia and is the national association of the land title industry. ALTA has approximately 2,300 members, including title insurance agents and title insurance companies, which do business in all 50 states, including the State of New York. ALTA has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respondent New York State Land Title Association ("NYSLTA") is an unincorporated organization organized in 1921 as the statewide association of the land title industry in the State of New York. NYSLTA has approximately 250 regular members, including title insurance agents and title insurance companies, doing business in New York. NYSLTA has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE

This brief is submitted by respondents American Land Title Association and New York State Land Title Association (collectively "ALTA") in opposition to the petitions for writ of certiorari filed by the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency (collectively "OCC") in case No. 92-645 and by The Chase Manhattan Bank, N.A. ("Chase") in case No. 92-482. The primary issue raised by the petitions

is whether 12 U.S.C. 92 limits the authority of national banks to engage in the title insurance agency business. The conclusion of the court of appeals that the statute has this effect does not merit review. It raises no conflict with the holding of any other circuit court and is consistent with the language and legislative history of section 92, and with prior judicial precedent.

**A. The Genesis of Section 92**

In 1863, Congress first established the powers of national banks in legislation that later became known as the National Bank Act. In addition to granting certain express powers, the legislation granted national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24 (Seventh) (1988 & Supp. II 1990) (hereafter "section 24 (Seventh)"). Over the next half century, numerous Supreme Court decisions addressed and delineated those powers that had been granted by Congress in the 1863 legislation and in subsequent amendments.

In February of 1916, the Federal Reserve Board published a memorandum from its counsel regarding the authority of national banks to engage in insurance agency activities. 2 Fed. Res. Bull. 73-74.[1] It concluded that a national bank had no express power to engage in such activities and that no such authority could be derived from the incidental powers provision of section 24 (Seventh). According to the Board, "[a]ny such extension of the powers of national banks must be left to the consideration of Congress." *Id.* at 74, App., *infra*, at 3a.

Four months later, in June 1916, Comptroller of the Currency John Williams wrote to the Congress recommending that it enact legislation, a draft of which was enclosed with the Comptroller's letter, that would grant insurance agency powers to national banks located in

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[1] This memorandum is reproduced at App., *infra*, 1a-3a.

small towns. 53 Cong. Rec. 11,001 (1916).[2] His letter confirmed that, under existing law (specifically referring to the incidental powers provision) and Supreme Court precedent, "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies . . . . It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." App., *infra*, at 6a. In proposing that Congress' grant of insurance agency powers "should be limited to banks in small communities," he reiterated that it would be "unwise and therefore undesirable to confer this privilege generally upon banks in large cities." App., *infra*, at 7a.

After increasing the small town population limit from 3,000 to 5,000, Congress enacted the legislation proposed by the Comptroller. This legislation was codified at 12 U.S.C. 92 (hereafter "section 92"), and remains today the only legislative grant of insurance agency powers to national banks.

### B. The *Saxon* and *Heimann* Decisions

Almost fifty years later, in the early 1960's, an advisory committee established by Comptroller of the Currency John Saxon concluded that national banks should have broader insurance agency powers and recommended that Congress enact legislation granting national banks the power to act as insurance agents in connection with their loan transactions. Instead of seeking the necessary legislation, Comptroller Saxon converted the panel's recommendation into an administrative ruling, which purported to determine that national banks already had such authority pursuant to their "incidental" powers. That ruling was struck down by the Fifth Circuit in *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*,

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[2] The full text of the Comptroller's letter, as printed in the Congressional Record, is set out in App. *infra*, at 4a-8a.

399 F.2d 1010 (5th Cir. 1968) ("*Saxon*"), which held that the Comptroller could not expand the insurance agency powers of national banks beyond the express and limited powers Congress had granted in section 92.[3]

In 1980, the D.C. Circuit in *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"), upheld regulations promulgated by the Comptroller to eliminate conflicts of interest in the sale of credit life insurance by national bank directors, officers, and stockholders. These regulations were intended to ensure that the bank itself, and not its principals, received the profits from the near-universal involvement by national banks in selling credit life insurance to their borrowers. The challenge to the regulations involved, in part, whether a national bank could be an agent for the sale of credit life insurance in the face of section 92. Based on the record in that rulemaking, the D.C. Circuit concluded that credit life insurance was so different from other forms of insurance that section 92 and the *Saxon* decision did not constitute a basis for invalidating the Comptroller's conflict of interest regulations. *Id.* at 1170.[4]

[3] Comptroller Saxon's ruling was: "Incidental to the powers vested in them under 12 U.S.C. Sections 24, 84 and 371, National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions." 399 F.2d at 1012. The full text of the ruling and its background is set out in the *Saxon* decision.

[4] Credit life insurance is one type of credit-related insurance that insures the lender of repayment of the outstanding balance due on a loan in the event of the death of the debtor. All forms of credit-related insurance, such as credit disability and involuntary unemployment insurance, basically relate to the terms and conditions under which a borrower's obligation to repay a loan will be deemed satisfied.

### C. The OCC's Title Insurance Ruling and the Instant Litigation

In 1986, the OCC issued an interpretive ruling that a national bank may act as agent in the sale of title insurance in any community regardless of population if such activities are undertaken in transactions involving the bank's loans. OCC Staff Interpretive Letter No. 368, *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986), *reprinted in* Chase Pet. App. 33a-44a.[5] The ruling relied extensively on the *Heimann* decision, not only to justify the conclusion that the sale of title insurance was incidental to banking, but also to reject the applicability of section 92 and the *Saxon* decision to title insurance. Chase Pet. App. at 41a-43a. Based on this ruling, in 1989 the OCC approved the establishment by petitioner Chase of two operating subsidiaries with authority to issue owner's and lender's title insurance policies in transactions involving residential and commercial mortgage loans made by Chase and its affiliates. Chase Pet. App. at 30a-32a.

Shortly thereafter ALTA initiated this action to obtain judicial review of the 1986 ruling on title insurance and the 1989 approval of the Chase application. The complaint urged that the OCC's ruling and approval be set aside as unlawful in that they permitted a national bank to engage in title insurance agency activities that are (a) prohibited to them by section 92, and (b) not authorized by section 24 (Seventh) or any other provision of law. After the filing of cross-motions for dismissal and summary judgment, the district court granted the de-

[5] The version of OCC Interpretive Letter No. 368 reprinted in the appendix to the OCC petition at 35a-45a omits eight paragraphs from the letter. These omitted paragraphs, which should have appeared before the carryover paragraph on page 42a of the OCC petition, appear on pages 39a-42a of the appendix to the Chase petition.

fendants' motion to dismiss.[6] The district court found that it was rational for the OCC to conclude that title insurance agency activities were within the incidental powers of national banks, it was not arbitrary and capricious for the OCC to conclude that section 92 was not a limitation on those powers, and the OCC's determination that title insurance differs from the forms of insurance addressed in section 92 was rational. OCC Pet. App. at 29a-30a.

**D. The Decision Below**

A unanimous panel of the Second Circuit reversed. OCC Pet. App. at 1a-18a; *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992). With regard to the contentions raised by the parties below,[7] the Second Circuit first addressed and rejected ALTA's suggestion that the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), were not applicable to interpretive rulings, such as the OCC's 1986 ruling on title insurance, on which there had been no opportunity for notice and public comment. The court concluded that the principles of *Chevron* were applicable and proceeded to apply them.

The court then focused on the language and legislative history of section 92. It concluded that the legislative history (in particular, the letter from Comptroller Williams) supported its finding that the statutory language precluded national banks from acting as insurance agents outside the provision's geographical restrictions. OCC

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[6] Chase had previously been granted leave to intervene as a defendant.

[7] Before addressing the parties' contentions, the court first concluded that section 92 remains valid law. The court felt compelled to address this issue in light of the decision in *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 & 92-507), which was handed down after oral argument in the ALTA case and which had concluded that section 92 was repealed in 1918. OCC Pet. App. at 3a-11a; 968 F.2d at 151-54.

Pet. App. at 12a-15a; 968 F.2d at 155-56. It also found that this analysis of congressional intent was fully consistent with the Fifth Circuit's analysis in *Saxon*. *Id.* at 15a; 968 F.2d at 156.

The court next addressed and rejected the OCC's contentions that *Heimann* and not *Saxon* was the determinative precedent. OCC Pet. App. at 15a-17a; 968 F.2d at 156-57. The court determined that the conclusion in *Heimann* was based on the nature of credit life insurance "rather than on the issue of whether section 92 impliedly operates as a bar to certain national bank activity."[8] The court did not disagree with the *Heimann* court's authorization of credit life insurance activities. Rather, the Second Circuit concluded that *Heimann's* discussion of the applicability of section 92 to credit life insurance was not persuasive on whether section 92 was applicable to a national bank's title insurance agency activities. *Id.* at 17a; 968 F.2d at 157.

Finally, having concluded that section 92 applied to the powers of national banks to engage in title insurance agency activities, the Second Circuit determined there was no need for it to address the scope of the incidental powers provision of section 24 (Seventh).[9] "[E]ven if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the specific limits on insurance activity in section 92." OCC. Pet. App. at 18a; 968 F.2d at 157.

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[8] OCC Pet. App. at 16a; 968 F.2d at 156. The court below also noted that "*Heimann's* persuasiveness is further eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history." *Id.* at 17a; 968 F.2d at 157.

[9] ALTA had argued that even if section 92 did not preclude the OCC's 1986 determination that national banks had the incidental power to engage in the title insurance agency business, that determination would be contrary to Supreme Court and lower court precedent on the proper scope of the incidental powers of national banks.

## REASONS FOR DENYING THE WRITS

The Chase petition seeks review of the decision below on two issues: (1) whether section 92 was repealed in 1918, and (2) the effect of section 92 on the ability of national banks to engage in insurance agency activities, such as title insurance agency activities, that the OCC has determined to be incidental to banking under section 24 (Seventh). The OCC petition seeks review on only the second issue. The decision below does not warrant review on either of these issues.

None of the parties to this case has ever argued that section 92 has been repealed. The Second Circuit considered the point after oral argument only because of the D.C. Circuit decision in *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 & 92-507). As the OCC petition recognizes, there is no need for the Court to grant review of the Second Circuit decision in order to address and resolve whether section 92 still exists.

Similarly, there is no need for the Court to grant review on the interpretation of section 92. Petitioners assert that a conflict exists among the circuits on the interpretation of section 92 as a limit on the insurance agency activities of national banks. In fact, there is no conflict. Only two circuits have ever squarely addressed the effect on section 92 on determinations by the Comptroller that national banks can engage in the insurance agency business under their "incidental" powers: the Second Circuit in the decision below and the Fifth Circuit in *Saxon*. Both decisions concluded that, with respect to the insurance agency activities at issue in the respective cases, the Comptroller could not authorize national banks to engage in such activities outside the limitations established by Congress in section 92.

The only appellate court decision cited by petitioners that presents even an apparent conflict with the decision

below is *Heimann*. No real conflict exists, however, between that decision and the *ALTA* and *Saxon* decisions. *Heimann* did not purport to make a definitive interpretation of section 92 in finding that credit life activities were so integral to national bank loan activities as to be permissible. Moreover, the concern expressed by petitioners—that the decision below would jeopardize the long-standing and widespread involvement of national banks in various forms of credit-related insurance—is unfounded. The decision below addressed only whether national banks can engage in the title insurance agency business.

Finally, there is no error in the decision below warranting review. The Second Circuit properly applied relevant principles of statutory interpretation (or, in the case of the OCC's misguided *ejusdem generis* contention, rejected irrelevant principles). In any event, the court's interpretation of section 92 as applying to title insurance has not been shown to be of sufficient moment to merit a separate hearing before this Court.

The petitions in this case should be denied or, if necessary, should be held pending resolution of the petitions in the *IIAA* case. If the Court denies those petitions, or grants review of the D.C. Circuit decision in the *IIAA* case and concludes that section 92 remains enacted law, it should then deny the writs requested here.[10]

## I. REVIEW OF THE DECISION BELOW IS NOT NEEDED TO RESOLVE WHETHER SECTION 92 EXISTS

In *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 &

[10] If the Court affirms the D.C. Circuit decision, it should grant the petitions here, vacate the decision below, and remand the case back to the Second Circuit for reconsideration in light of the Court's decision in *IIAA*.

92-507) ("*IIAA*"), the D.C. Circuit concluded that section 92, which was enacted in 1916, had been repealed in 1918. This decision was handed down in February 1992, after oral argument had been held before the Second Circuit in the instant case. While the parties below had recognized that section 92 was no longer codified in the U.S. Code, the existence or repeal of section 92 was not an issue in the case. The parties had neither briefed nor argued that issue. Because of the *IIAA* decision, however, the Second Circuit felt compelled to address the repeal issue. The Second Circuit disagreed with the D.C. Circuit and concluded that section 92 was not repealed in 1918. OCC Pet. App. at 3a-11a; 968 F.2d at 151-54.

The Chase petition suggests that review of the decision below is needed in order to resolve a conflict between the two circuits regarding the continued existence of section 92. Chase Pet. at 12. As the Solicitor General has implicitly recognized, this case is not the appropriate vehicle for review of the issue of the existence of section 92. Entertaining the same question in both the *IIAA* case and the instant case would involve duplicative and burdensome argument that would be of little benefit to the Court.

In addition, even if the Court were to determine in the *IIAA* case that section 92 was repealed in 1918, the basis for the decision below in the instant case would still remain. As the Second Circuit recognized, Congress' enactment of the provision demonstrated that section 92 was understood and intended as the sole statutory authority for the insurance agency activities of national banks. The repeal of section 92 would not cast doubt on that conclusion, but would merely suggest that Congress had concluded that even this limited insurance agency authority was inappropriate for national banks.

Indeed, it is not even clear that the instant case would provide a full and adversarial presentation of the issue

of the existence of section 92. The OCC petition contends that it is the *IIAA* decision, not the Second Circuit decision, that is in error on this issue. OCC Pet. at 9. The OCC petition pointedly declines to raise the existence or repeal of section 92 as an issue that justifies this Court's review of the Second Circuit decision. Clearly, the OCC will not argue in this case that section 92 has been repealed. The Chase petition, while asserting a conflict between the Second Circuit and the D.C. Circuit, fails to indicate what position Chase would take regarding whether section 92 exists. Thus, it is possible that, as in the court below, no party in this case will argue that section 92 has been repealed.

In short, there is no reason for the Court to grant review of the decision below in order to address whether section 92 was repealed.

## II. THE DECISION BELOW DOES NOT WARRANT REVIEW BY THIS COURT

The Second Circuit's decision on the application of section 92 to the title insurance agency activities of national banks does not raise a conflict among the circuits or any other issue that merits this Court's review.

### A. There Is No Conflict Among the Circuits on the Relationship of Section 92 to the Incidental Powers of National Banks Under Section 24 (Seventh)

Only two circuit courts, the Second Circuit in the case below and the Fifth Circuit in *Saxon*, have examined whether section 92 limits the scope of insurance agency activities by national banks other than with respect to the sale of credit-related insurance. Both circuits, after a thorough examination of the language and legislative history of section 92, reached identical conclusions. Other than the *Heimann* decision, the other appellate court decisions cited by petitioners either did not address

section 92 or did so by way of dicta.[11] The lower court decisions cited by petitioners are likewise not in conflict with the Second Circuit's interpretation of section 92.[12]

The petitions seek to create a conflict by contending that the Second Circuit's reading of section 92 is incompatible with *Heimann*. OCC Pet. at 10; Chase Pet. at 16-17. An examination of *Heimann* and the OCC rulemaking at issue in that case makes evident that there is no conflict. The unique factors that led the D.C. Circuit in *Heimann* to conclude that national banks could sell credit life insurance outside the limitations of section 92 are not relevant to title insurance agency activities.

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[11] *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988), did not discuss or even mention section 92.

The footnote in *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984), suggests, without explanation or analysis, that *Saxon* may have been wrongly decided because the legislative history of section 92 indicates that Congress was only concerned with providing small town banks an additional source of profits, not with prohibiting city banks from selling insurance. The court's unsupported statement is clearly in error in light of the Comptroller's 1916 letter to the Congress ("It would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities . . . ."). 53 Cong. Rec. 11,001 (1916); App., *infra*, at 7a.

[12] *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.), affirmed the OCC's determination that section 92 did not apply to the sale of annuity contracts by national banks because such contracts were "primarily financial instruments, not insurance." *Id.* at 641. That determination, even if upheld on appeal by the Fifth Circuit, would be distinguishable from the *ALTA* and *Saxon* decisions, which involved insurance products.

*Sanford v. Garamendi*, 284 Cal. Rptr. 897 (Ct. App. 1991), involved provisions of state law, not section 92. While one statutory provision at issue was patterned after section 92 the court's interpretation of that provision was influenced by the legislative history of that state law provision and the existence of another provision of California banking law authorizing state banks to engage in any business activity not prohibited by state law. *Id.* at 903. There is no comparable provision in the National Bank Act.

These factors, discussed immediately below, were addressed at length in ALTA's brief to the Second Circuit. They demonstrate why *Heimann* concluded that credit life insurance was "[u]nlike other forms of insurance." 613 F.2d at 1170. They also demonstrate why the Second Circuit properly concluded that *Heimann* was limited to the credit life context and was not persuasive on whether section 92 was applicable to a national bank's title insurance activities.[13]

First, credit life insurance, unlike title insurance or automobile or homeowners insurance, is a product that exists solely for the protection of credit grantors. Credit life insurance "has no appeal whatsoever to persons not simultaneously borrowing from the bank." Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3. In concluding that *Saxon* did not apply to credit life, the Comptroller noted that other types of insurance were "commonly sought by the public outside the credit granting process." *Id.* at 48,519 col. 1. Although title insurance, like automobile and homeowner's insurance, is customarily required by banks to protect the collateral for their loans, title insurance, unlike credit life insurance, is purchased by owners of real estate and others quite apart from the credit granting process.

Second, credit life insurance would not be available unless credit grantors, such as national banks, sold the

[13] These factors also distinguish credit life insurance from the types of property/casualty insurance at issue in *Saxon*.

The credit life insurance regulations reviewed in *Heimann* are codified at 12 C.F.R. §§ 2.1-2.7 (1992). The rulemaking notices in which these factors were discussed by the Comptroller are *Disposition of Credit Life Insurance Income* (Final Regulation), 42 Fed. Reg. 48,518 (1977) (hereafter "Final Rulemaking"), and *Disposition of Credit Life Insurance Income* (Proposed Rulemaking) 41 Fed. Reg. 29,846 (1976) (hereafter "Proposed Rulemaking").

insurance.[14] It is issued solely to protect the lender and serves the same purpose as "additional collateral, a co-maker or a guarantor." *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2. In this economic sense, credit life insurance can be viewed as part of the loan repayment terms.

Third, national banks were almost universally involved in the sale of credit life insurance at the time of the OCC's credit life rulemaking.[15] Thus, the OCC rulemaking reviewed in *Heimann* was not authorizing national banks to engage in a new activity. It was merely regulating an activity that was already being engaged in by most national banks. In contrast, national banks were not engaged in the title insurance agency business before the OCC's 1986 ruling on title insurance.

Fourth, unlike the work of a title insurance agent, a bank that sells credit life insurance performs only *de minimis* clerical work. In acting as an agent to enroll borrowers in its credit life insurance program, the bank undertakes little administrative work and essentially none of the investigation and risk evaluation activities that title insurance agents and agents for other lines of in-

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[14] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2 (credit life insurance is "peculiarly related to the business of banking and not generally available from insurance agencies unaffiliated with financial institutions"); *id.* at col. 3 n.3 ("Congress recognized that creditors are virtually the only source of credit life insurance").

In contrast, title insurance has been and continues to be available from a wide range of independent title insurance agencies, such as the members of respondent associations, and would continue to be readily available in the marketplace if national banks did not engage in the title insurance agency business.

[15] *See* Proposed Rulemaking, 41 Fed. Reg. at 29,847 col. 1 (Comptroller's conclusion influenced by the widespread availability of credit life insurance at commercial banks throughout the United States) and n.1 thereto (survey by national bank examiners of 2,900 national banks indicated that fewer than 20 were *not* providing credit life insurance) (emphasis supplied).

surance perform.[16] Indeed, one could well distinguish *Heimann* on the basis that the role a bank plays in the sale of credit life insurance cannot be considered to be that of an insurance "agent" within the meaning of section 92. At least one district court that has examined the activities of national banks in selling credit life insurance has come to this conclusion. See *First Nat'l Bank v. Smith*, 436 F. Supp. 824, 831-33 (S.D. Tex. 1977), *modified*, 610 F.2d 1258, 1262 (5th Cir. 1980) (discussion of section 92 vacated as unnecessary to resolution of case).[17]

Moreover, a bank that sells credit life insurance performs no activities and exercises no discretion over the scope of policy protection that can give rise to conflicts of

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[16] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3 (banks engaged in selling credit life insurance do not engage in risk investigation or evaluation or other functions typically performed by an independent insurance agent); *id.* at 48,521 col. 3 ("the administrative cost of producing credit life insurance income is close to negligible"). *See also Commissioner v. First Sec. Bank*, 405 U.S. 394, 397 (1972) ("The cost to each of the Banks for the actual time devoted to explaining and processing the [credit life] insurance was less than $2,000 per year, characterized by the courts below as 'negligible.'").

[17] The *Smith* case, like *Heimann*, involved a challenge to an OCC directive (issued before the OCC's credit life regulations were promulgated) that the bank, rather than its officers, realize any financial benefits to be derived from the sale of credit life insurance. The Fifth Circuit noted that the district court had resolved the purported conflict between section 92 and the OCC's directive "by determining that the handling of credit life by the banks does not constitute the bank or its employees 'agents' as that term is used in section 92." 610 F.2d at 1262.

The appellate court concluded, however, that the district court did not have to decide this issue because the OCC's directive only required the bank to stop the practice of allowing its officers to receive credit life commissions, but did not require the bank itself to become a credit life agent. *Id.* Accordingly, the Fifth Circuit vacated those parts of the lower court opinion that pertained to section 92.

interest. This is not the case when a bank acts as agent in the issuance of title insurance policies insuring its own mortgage loans. A title insurance agent issues policies on behalf of its insurance company after a thorough search and examination of the relevant title-related records and documents. As a title insurance agent issuing policies on its own loans, a bank faces an inherent conflict of interest between its interest as an insured in obtaining the broadest policy coverage and its obligations to minimize the exposure to undue risks of the title insurance company for which it is acting as a policy-issuing agent.

In sum, it is apparent why the Second Circuit concluded that the *Heimann* analysis, while relevant to credit life insurance, did not apply to title insurance.[18] Neither the decision below nor *Saxon* compels the conclusion that *Heimann* was wrong with regard to the credit life activities at issue in *Heimann*. Nor does *Heimann* compel the conclusion that *Saxon* or the decision below was wrong with regard to the property/casualty and title insurance agency activities addressed in those cases. There is no conflict between *Heimann* and the decision below.

### B. The Decision Below Raises No Issue of Importance That Merits Review by This Court

The Second Circuit's determination that national banks are precluded from the title insurance agency business outside of small towns raises no issue of overriding importance that merits this Court's review.

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[18] The Bank Holding Company Act, while generally prohibiting bank holding companies from "provid[ing] insurance as a principal, agent, or broker," also recognizes an exception for such credit-related insurance. 12 U.S.C. 1843(c)(8)(A) (1988). See *Heimann*, 613 F.2d at 1170 n.19. In contrast, the Federal Reserve Board has determined that title insurance is encompassed in the Bank Holding Company Act's prohibitions on insurance activities. *See First Wisconsin Corp.*, 75 Fed. Res. Bull. 31, 32 (1989), *aff'd*, *American Land Title Ass'n v. Board of Governors*, 892 F.2d 1059 (D.C. Cir. 1989).

Other than Chase, only a handful of national banks have started title insurance agency operations in reliance on the OCC's 1986 title insurance ruling.[19] Prior to that ruling, there is no evidence that national banks had been engaged in the title insurance agency business.[20] Thus, the determination of the court below will not affect the existing activities of many national banks. If, as the OCC suggests (OCC Pet. at 16-17), it would be desirable for national banks to be able to provide title insurance to their borrowers, such a policy decision should properly be left to Congress.

The petitions exaggerate the scope of the decision below in claiming that the decision "directly threatens" or "calls into question" the ability of national banks to sell credit life insurance and other types of specialized credit-related insurance and products that national banks have long offered to their customers. Chase Pet. at 18; OCC Pet. at 17. The decision below relates only to title insurance. The Second Circuit has not determined that section 92 prohibits national banks from selling credit life insurance

[19] In response to a recent Freedom of Information Act request for information on national banks that have received approval to establish title insurance agency operating subsidiaries, the OCC has indicated that it does not maintain records in a manner that would indicate how many national banks have received approval to engage in particular activities. From information provided in response to previous FOIA requests, ALTA believes that fewer than six other national banks have received approval to establish title insurance agency operations.

[20] The OCC petition states that "many banks provided title insurance directly in 1916," implying that section 92 could not have been intended by Congress to foreclose activities that national banks were engaged in at the time. OCC Pet. at 14 n.5. While *state* banks and trust companies in certain cities were engaged in title insurance activities at that time, there has never been any evidence that *national* banks were engaged in such activities. As the OCC has noted, as a result of the failure of many of these state financial institutions in the Depression, which also resulted in the failure of their affiliated title companies, "[m]ost states now restrict banks from engaging in title insurance." Chase Pet. App. at 36a.

or any of these other types of insurance cited by the petitions.

The petitions raise concerns about a conflict that may never arise. There is no reason to believe that a challenge to the credit life insurance activities approved by the OCC in 1977 and upheld in *Heimann* could be instituted at this late date. This would also be true of the other types of credit-related insurance, such as a credit disability insurance, mortgage life and disability insurance, and involuntary unemployment insurance, that have long been permitted by the OCC.[21] If a future circuit court decision should create a real conflict with *Heimann* by holding that national banks may not sell credit-related insurance outside of the limitations of section 92, this Court can address and resolve such a conflict at that time. Until then, there is no reason for the Court to correct a theoretical conflict that may never arise and is clearly not raised by the holding below.

### C. There Is No Error in the Second Circuit's Decision That Warrants Review

The petitions also allege that the Second Circuit's decision merits review because of several alleged errors made by the court in reaching its decision on the interpretation of section 92. OCC Pet. at 11-16; Chase Pet. at 19-24. While the Court does not sit to correct the errors of courts below, in fact the Second Circuit did not err and its decision represents a proper construction of the language and history of the statute.

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[21] *See* Chase Pet. at 15. Similarly, the authority of national banks to sell debt cancellation contracts is not affected by the decision below. Such contracts involve an additional charge to the borrower in return for the bank's obligation to cancel the unpaid balance of the loan in the event of the borrower's death. In this regard, they perform a function similar to credit life insurance. *See First Nat'l Bank v. Taylor*, 907 F.2d 775, 776 (8th Cir.), *cert. denied*, 111 S. Ct. 442 (1990) (upholding OCC authorization for national banks to sell such contracts). Section 92 was not an issue in that case and nothing in the decision below is in conflict with that decision.

First, petitioners suggest that the court ignored the introductory language to section 92 ("In addition to the powers now vested by law in national banking associations . . . ."), which the petitions contend reflects Congress' intent to make clear that section 92 was supplementary to the insurance powers conveyed by section 24 (Seventh). OCC Pet. at 12; Chase Pet. at 19-21. This interpretation of the introductory language to section 92 makes no sense in light of Comptroller Williams' conclusion, expressed in the same letter that recommended enactment of section 92, that no such powers existed under section 24 (Seventh) or any other provision of law. It is absurd to read this language, which was drafted by Comptroller Williams, as reflecting Congress' desire to preserve incidental powers that the Comptroller had told Congress did not exist.[22]

Second, the court below properly applied the interpretive principle of *expressio unius est exclusio alterius* ("expression of one thing is the exclusion of another") to conclude, as did the *Saxon* court, that Congress intended section 92 to prohibit national banks in towns of over 5,000 inhabitants from engaging in the insurance agency business. OCC Pet. at 13; Chase Pet. at 22-23. Application of the principle might be questioned in a case where there were strong indications of contrary legislative intent or where a court simply cited an express, but limited, grant of powers and concluded, from this limited grant alone, that Congress intended to preclude any broader powers. This is not how the court below applied this principle of statutory construction. The court below applied the *expressio unius* principle only after concluding that the legislative history demonstrated that Congress

[22] Indeed, in light of the legislative history, the introductory language is better understood as a "finding" by the Congress that the powers "*now* vested by law in national banking associations" did not include the power to engage in the insurance agency business.

understood that national banks had no other insurance powers.[23]

Third, the OCC petition contends that the court below "overlooked" the maxim of *ejusdem generis* when it concluded that the language of section 92 (which applies to national banks acting as "agent for any fire, life, or other insurance company") applied to title insurance. OCC Pet. at 13-14. The court below did not "overlook" this maxim, since its relevance and application to the language of section 92 was urged upon the court below by the OCC and contested by ALTA. OCC Br. at 20-21; ALTA Reply Br. at 5-7. Rather, the court apparently concluded that the OCC's *ejusdem generis* argument added so little to the OCC's general position that section 92 did not apply to title insurance that the argument did not warrant any separate discussion.

Finally, the petitions contend that the court below failed to give proper deference to the OCC's interpretation of section 92 under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). OCC Pet. at 16; Chase Pet. at 20-22. Deference to an agency interpretation under *Chevron* is only relevant if the court cannot determine congresional intent. If the court is able "to determine congressional intent, using 'traditional tools of statutory construction,'" then "that interpretation

[23] This Court, in construing the powers of national banks, has similarly recognized that a congressional grant of limited powers in a particular area reflects the denial of broader powers in that area. *See, e.g., Texas & Pac. Ry. v. Pottorff*, 291 U.S. 245, 258 (1934) (amendment to National Bank Act granting power to pledge assets to secure deposits of governmental entities "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits"); *First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924) (rejecting argument that national banks have the incidental power to establish branch offices in view of express provision that the business of a national bank shall be transacted at "an office or banking house located in the place specified in its organizational certificate").

must be given effect, and the regulations at issue must be fully consistent with it." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). In this case the court properly determined and applied Congress' intent and had no need to proceed to the second step of *Chevron*.

In sum, the decision below committed no error, and certainly none that merits review by this Court.

### D. Reversal of the Decision Below Would Not Resolve This Litigation

Even if the Court were to review and reverse the decision of the court below on the section 92 issue, its judgment would not necessarily resolve this case. There is a second critical issue that the court below concluded it did not have to address: whether the OCC's determination that title insurance agency activities were within the incidental powers of national banks under section 24 (Seventh) was contrary to law or otherwise an abuse of discretion. Even if the court below were wrong in its analysis of section 92, it is highly likely on remand to conclude that, even apart from section 92, the OCC's title insurance ruling was in excess of law.[24] Accordingly, the

[24] An analysis of relevant precedent of this Court demonstrates that section 24 (Seventh) authorizes the entry of national banks into a new line of business only when the new activities are (1) a form of, or functionally equivalent to, deposit taking, credit granting, and credit exchanging activities, or (2) reasonably necessary to enable national banks to perform those activities more effectively or efficiently. *See generally* Symons, *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676 (1983). ALTA's brief to the court below developed this analysis at length. The decisions of courts of appeal on this issue, including the cases chiefly relied on by the OCC in determining that title insurance agency activities were incidental to banking, *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972) and *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), are consistent with this analysis of Supreme Court precedent.

Court's time and effort in resolving the section 92 issue would not resolve this litigation.[25]

## CONCLUSION

For all the foregoing reasons, this case is not appropriate for review. Pending a decision in the *IIAA* case, the Court should defer its resolution of the instant petitions. If the Court denies the petition in the *IIAA* case or reverses the D.C. Circuit's judgment in that case, it should deny the petitions for writ of certiorari here. If the Court affirms the judgment in the *IIAA* case, it should remand this case to the court below for reconsideration in light of that opinion.

Respectfully submitted,

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November 12, 1992

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[25] Indeed, the resolution of the section 92 issue would not resolve the questions that may arise in other banking cases on the proper scope of the "incidental to banking" standard—an issue not even reached here by the court of appeals.

# APPENDIX

## APPENDIX

FEDERAL RESERVE BULLETIN
FEBRUARY 1916
PAGES 73-74

### Right of a National Bank to Write Insurance Through Its Officers.

National banks have no express or implied power to write fire, cyclone, liability, or other kinds of insurance, or to receive the profits from insurance contracts entered into by its officers.

JANUARY 13, 1915.

SIR: The question has been raised whether, it is lawful for the officers of a national bank to write fire, cyclone, liability, and other kinds of insurance, all the profits derived from such business being turned into the bank.

The powers of national banks are defined by section 5136, United States Revised Statutes Article VII of which provides:

> To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

The power to write insurance, act as insurance agent or broker, is not specifically enumerated in this section, and unless such business can be considered as incidental to some of the enumerated powers of national banks it is illegal and prohibited by implication as clearly as if

by expression. Logan County National Bank *v.* Townsend, 139 U.S., 67.)

In Farmers & Merchants National Bank *v.* Smith (77 Fed., 129) it was held that it is not within the powers of a national bank to engage in the business of selling mortgage bonds on commission.

Circuit Court Judge Thayer, on page 137, said:

> The brokerage business is entirely distinct from the business of banking which it was authorized to transact. If a national bank can lawfully act as a broker in selling farm mortgages for a commission, no reason is perceived why it may not act in the same capacity in selling any other species of property, real or personal. The national bank act does not, in terms or by necessary implication, authorize national banks to act as brokers in negotiating the sale of securities, and it is generally agreed that they can not lawfully engage in such business.

In Pepperday *v.* Citizens National Bank (183 Pa. St., 519, 524) the Supreme Court of Pennsylvania said:

> It is no part of the business of a national bank to engage in the selling of stocks for anybody. It was a transaction outside of its regular banking business and not within its chartered powers.

In Weckler *v.* First National Bank (42 Md., 581) the court said, on page 593:

> Nor can we perceive it is in anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country.

By analogy it would seem that writing insurance on commission is in no sense incidental to any of the enumerated powers of a national bank.

It is contended that the national bank, in the instance under consideration, is not acting as agent for the insurance company, but that its officers write the insurance in their individual capacities and turn in all the profits to the bank.

If the bank receives all the profits of writing the insurance, its officers are, in substance, acting as agents for the bank, and the bank is estopped to deny that it is engaging in the insurance business.

In Schuyler National Bank *v.* Gadsden (191 U.S., 451) it was held that the taking of real-estate security by the president of a national bank in his individual name for the benefit of the bank was in legal effect but the taking of security by the bank itself, and the president acted as its agent.

Where a national bank retains and enjoys the proceeds of a transaction, it is estopped to deny that the act of the officer who enters into the transaction is its own. (Peoples Bank *v.* National Bank, 101 U.S., 181.) National banks, as such, must of necessity act through their officers or other agents.

Inasmuch, therefore, as this class of business does not come within either the expressed or implied powers of national banks, an administrative board or officer can not authorize it. Any such extension of the powers of national banks must be left to the consideration of Congress.

Respectfully,

M. C. ELLIOTT, *Counsel.*

To Hon. C. S. HAMLIN,
*Governor Federal Reserve Board.*

# LETTER FROM COMPTROLLER WILLIAMS

53 CONG. REC. 11,001 (1916)

TREASURY DEPARTMENT,
COMPTROLLER OF THE CURRENCY,
*Washington, June 8, 1916.*

MY DEAR SENATOR:

The original national-bank act of February 25, 1863, as re-enacted by the act of June 3, 1864, authorizing the formation of national banks throughout the country, provided that no national bank should be authorized with a capital of less than $50,000 in any place; that in a place with a population exceeding 6,000 the capital of the bank should not be less than $100,000, and further provided that no national bank with a capital of less than $200,000 should be organized in any place having a population of over 50,000.

Later on it became manifest that there were many country towns and villages which needed banking facilities but which did not have sufficient business to justify the organization of national banks with a capital of as much as $50,000. To extend the benefits of banking facilities to these small places the national-bank act was amended by the act of March 14, 1900, so as to authorize the organization in towns and villages with a population not exceeding 3,000 of banks with a minimum capital of $25,000.

Since this amendment to the bank act went into effect there have been organized throughout the country 3,084 national banks having a capital of $25,000. Four hundred and thirty-eight of these $25,000 banks have either failed or gone into liquidation, some have increased their capital, and the number of such banks with a capital of $25,000 now in operation is 2,079, or 27 per cent of the total number of national banks.

The average deposits (individual and bank) at this time of all $25,000 banks is $178,138, or 7.13 times their capital and 4.6 times their capital, surplus, and profits. A country bank with $25,000 capital and with the average deposits is able, with good management, to lend its money at rates authorized by law and at the same time to return a reasonable dividend to its shareholders. But there are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers. It is unfortunately true that in many other cases banks have been demanding usurious rates of interest even though they had more than the average deposits and although adherence to the legal rates would still yield them liberal dividends on their shares.

For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Under Section 5736, United States Revised Statutes, the busines of national banks at this time is limited to the exercise of "such incidental powers as shall be necessary to carry on the business of banking by (a) discounting and negotiating promissory notes, drafts, bills of exchange or other evidences of debt; (b) receiving deposits; (c) buying and selling exchange, coin, and bullion; (d) loaning money on personal security; (e) obtaining, issuing, and circulating notes according to the provisions of this title."

Under the Federal reserve act the banks are further authorized under specified restrictions to make certain loans on real estate.

National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies or as brokers or agents for others in procuring or making real estate loans.

The courts have uniformly held that such corporations can exercise only those powers which are expressly granted or which are necessarily incidental to powers that are granted.

As stated by Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court in the case of Logan County National Bank v. Townsend (139 U.S., 67):

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

Again in the case of National Bank v. Matthews (98 U.S., 625), Mr. Justice Swan, in delivering the opinion of the court, said:

"Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed."

It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law.

My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in villages and towns having a

population of not exceeding 3,000 may be permitted to act as agents for insurance companies in the placing of policies of insurance—fire, life, etc.—and that they may also be authorized to act as agents for the negotiation of loans on farms or other real estate in their respective sections of the country, where they may be in position to have some direct knowledge as to the value of the property upon which such loans are to be secured.

It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to assume such whereas as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written or mortgages to be placed on commission is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

I inclose with this a draft of a proposed amendment to the national-banking act designed to empower national banks located in towns of not over 3,000 population, under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller

of the Currency, to act as agents for the placing of insurance policies and also to act as agent in making or procuring loans on real estate.

I respectfully recomend and urge the adoption of such an amendment for the reasons I have given.

I am to-day writing a letter similar to this to Congressman Glass, chairman of the Banking and Currency Committee of the House of Representatives.

*Respectfully,*

JNO. SKELTON WILLIAMS,
*Comptroller.*

HON. ROBERT L. OWEN,
*United States Senate.*

Nos. 92-482, 92-645

Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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THE CHASE MANHATTAN BANK, N.A.,

*Petitioner,*

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*

*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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**Brief of First Interstate Bancorp, First Union Corporation, The Huntington National Bank, KeyCorp, National City Corporation, and Wells Fargo Bank, N.A. as Amici Curiae in Support of the Petitions**

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## QUESTION PRESENTED

Whether 12 U.S.C. § 24(Seventh) allows national banks, with the approval of the Comptroller of the Currency, to conclude that national banks may sell various forms of insurance as part of "the business of banking," despite the existence of 12 U.S.C. § 92, which grants national banks located in places of 5,000 or less population the additional power to "act as the agent for any fire, life, or other insurance company."

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## INTEREST OF THE AMICI CURIAE[1]

*Amici* are national banks and bank holding companies with national bank subsidiaries engaged in the business of banking and various other activities, including insurance and insurance-related activities incidental thereto. *Amici* have a vital interest in legal questions affecting the scope of 12 U.S.C. § 24(Seventh) (1988 & Supp. II 1990), which your *amici* believe allows for a flexible and evolutionary conception of "the business of banking."

## SUMMARY OF ARGUMENT

Since its enactment in 1864, the National Bank Act has addressed itself to the regulation of "the business of banking," without ever defining the meaning of that term. This lack of definition is critical to the long-term success of the statute, because from the colonial era to the present, the banking industry has traveled a path of evolution and change. That change has been guided by the long-term vision and special expertise of the chartering authority of national banks, the Comptroller of the Currency, who has exercised the authority to determine what activities are within, or "incidental to," "the business of banking." He has interpreted the National Bank Act to authorize, *inter alia*, certain insurance activities as a proper incident of "the business of banking."

Congress, by leaving "the business of banking" undefined, has left the evolution of the industry to be shaped by banks themselves, under the supervisory authority of the Comptroller. Congress has seen fit to intervene only when it has been necessary to override the evolutionary process and positively establish an activity as part of the business of banking *vel non*. The Court of Appeals' conclusion that the limited congressional grant of insurance authority contained in 12 U.S.C. § 92 forecloses the

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[1]The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of this Court.

historical evolutionary process under the principle of *expressio unius est exclusio alterius*, is a major step toward replacing the proper regulatory role of the Comptroller with the inflexible and static decisions of courts. If left unreviewed, the Second Circuit's decision could severely curtail the ability of the banking industry to remain competitive by developing improved products and services using changing communications and computer technology. To preserve the existing statutory scheme of effective national bank regulation, this Court should grant certiorari.

## REASONS FOR GRANTING THE PETITIONS

### THE SECOND CIRCUIT'S CONSTRUCTION OF SECTION 24(SEVENTH) CRITICALLY THREATENS THE DEVELOPMENT AND SURVIVAL OF THE NATIONAL BANKING INDUSTRY.

The financial services industry is rapidly changing in response to changes in technology and increasing competition between banking and unregulated service providers. National banks look to decisions of the Comptroller of the Currency to be able to engage in the sale of newly-developed financial products, including banking-related insurance products. The Second Circuit's decision, however, threatens to handicap these banks by impairing the essential flexibility of § 24(Seventh)'s incidental powers clause. By denying the Comptroller the power to develop "the business of banking" in response to the rapidly-changing financial services marketplace, the Second Circuit's decision, if not reviewed, would effectively freeze the definition of "the business of banking," at least with respect to insurance activities,[2] in a manner which squares neither with the Comptroller's

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[2]Although the decision of the Court of Appeals applies only to title insurance, its approach, of giving no deference to the Comptroller's interpretation of a statute, could have the practical effect of supplanting the Comptroller's broad chartering and guiding role with an inflexible court-imposed definition of "the business of banking."

principal role in defining the contours of an evolving "business of banking" nor with the survival of national banks in an intensely competitive climate.

### A. Banks and The Comptroller Have Developed "The Business Of Banking" in an Evolutionary Fashion.

In today's marketplace, national banks face substantial and ever-increasing competition from state banks, savings and loan associations, and non-bank financial institutions, including credit unions, insurance companies, and even retail stores.[3] Only national banks, though, are subject to the strictures of the National Bank Act. As we show below, the Second Circuit's interpretation of that Act threatens the development and provision of improved financial products to bank customers, and places national banks at a significant competitive disadvantage.

#### 1. "The Business of Banking" Has Evolved Over Time.

The history of the American banking business is a history of change. Indeed, commercial banking was virtually unheard of in colonial America, due principally to two factors: the opposition of British merchants, and the colonists' general lack of experience with financial institutions. Ross M. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* 13 (1968). The first commercial bank was not chartered in the United States until 1781, and by 1811, there were only 88 banks in the country. *Id.* These banks received deposits and made loans, *id.*; *see also*

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[3]Conglomerate financial institutions, such as Sears, "can now take deposits, cash checks, make loans, sell securities, sell insurance, and offer real-estate brokerage services, all under one roof." Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 677 (1983). *See also* Martin Mayer, *The Money Bazaars* 34-71 (1984) (outlining recent rise of "financial services institutions").

Comment, *Independent Bankers Association v. Conover: Nonbank Banks Are Not In The Business Of Banking*, 35 Am. U. L.Rev. 429, 439 n.41 (1986), however, most lending was limited to extremely short terms. Some banks limited their discounts to 30 days, others extended credit for as long as 60 days. Robertson, *supra*, at 15. The "most important function" of banks at that time, however, was the issuance of notes, which served as money. Edward L. Symons, Jr., *The "Business of Banking" In Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 686 (1983).

Significantly, however, even during that early era, "the most inventive bankers were forever experimenting with new types of credit, finding new ways to earn profits for their stockholders while protecting the solvency of their institutions." Robertson, *supra*, at 15. The development of such new financial services was effected without explicit Congressional (or judicial) direction. Among other things, those institutions thought of as the "sophisticated banks of the East" began practicing what is now called "investment banking," including underwriting securities issues and buying private and municipal bonds. *Id*; *see also* Symons, *supra*, 51 Geo. Wash. L. Rev. at 687. The banking franchise, largely embodied in § 24(Seventh) of the National Bank Act, was widely recognized to accommodate such diverse financial activities -- at least until Congress adopted § 16 of the so-called Glass-Steagall Act, which, *inter alia*, explicitly amended that provision to curtail certain securities activities in response to the collapse of the Great Depression. Act of June 16, 1933, ch. 89, 48 Stat. 162, 184 (codified as part of 12 U.S.C. § 24 (Seventh)).

At the beginning of the nineteenth century, three new types of financial institutions -- unincorporated banks, mutual savings banks, and insurance companies -- began to emerge. The unincorporated banks differed from chartered banks primarily by the fact that the unincorporated banks did not issue notes. Mutual savings banks and insurance companies, on the other hand, amassed their capital through long-term credit activities such as

individual savings accounts and life insurance. Symons, *supra*, 51 Geo. Wash. L. Rev. at 688 & n.63.

Notwithstanding these changes, the United States did not have a uniform currency at the time of the Civil War; "some 9,000 different kinds of paper bills were in circulation" by 1860. Robertson, *supra*, at 29. So Congress, faced with a nation divided by war and beset by desperate financial problems, passed the National Currency Act of 1863, ch. 58, 12 Stat. 665, which for the first time gave the country a national currency (national banks nonetheless retained the privilege of issuing those notes). That Act gave national banks certain enumerated powers, but also bestowed upon national banks explicitly undelineated authority to "exercis[e] such incidental powers as shall be necessary to carry on the business of banking."[4] That Act also created the position of Comptroller of the Currency, head of a separate bureau within the Treasury, charged with the dual role of chartering and supervising national banks. Congress clearly envisioned the Comptroller to have a quasi-independent role as the overseer of national banks: The Comptroller was to serve a term longer than the President (five years), could only be *removed* (as well as appointed) by the President with the advice and consent of the Senate, and was annually required to report directly to Congress, not through the Secretary of the Treasury.[5] "Congress ob-

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[4]Virtually the same language ("To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking") appears in the current version of the statute, 12 U.S.C. § 24(Seventh). Neither the National Currency Act, nor its immediate successor, the National Bank Act, nor any other act, has defined this term.

[5]When Congress passed the National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified at 12 U.S.C. § 21 *et seq.*), which replaced and improved upon large parts of the previous year's National Currency Act, the removal provision was changed to "upon reasons to be communicated by [the President] to the Senate." The five-year term and the direct reporting to Congress, however, both remain to this day. *See*

viously considered the Comptrollership a major job. . . . The obvious person for such a position would be a seasoned banker." Robertson, *supra*, at 47. The Comptroller and his Office today remain outside the fiscal purview of Congress, as funds for maintaining the Office are obtained from assessments on national banks, not from Congressional appropriations. 12 U.S.C. § 10 (1988); Robertson, *supra*, at 171.

The evolution of "the business of banking" continued throughout the late nineteenth century under the largely unfettered auspices of the Comptroller and his state bank counterparts. While the issuance of notes provided banks an "undeniable advantage" in 1865, it had become an "anachronism" by the early 1880s as banks expanded their retail and leasing functions. Robertson, *supra*, at 62, 64. Expansions of some bank activities, including, *inter alia*, branching, were effected by explicit statutory authorizations. By the end of the 19th century, national banks were interested in opening branches in rural areas to meet the needs of those communities. Recognizing that national banks were compelled to compete with state institutions (which generally operated under much more liberal banking laws), Comptroller D.R. Crissinger recommended to Congress that national banks be explicitly allowed to operate branch offices. Comptroller of the Currency, *Annual Report* 2-3 (1922). Ultimately, Congress passed the McFadden Act in 1927 to amend the National Bank Act and specifically authorize limited branching of national banks.[6] Act of Feb. 25, 1927, ch. 191, 44 Stat. 1224. A number of pieces of Depression-era legislation expanded national banks' branching powers even more. *See generally* Douglas H. Ginsburg, *Interstate Banking*, 9 Hofstra L.Rev. 1133, 1153-54 (1981).

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12 U.S.C. §§ 2, 14 (1988).

[6]Despite providing definitions of terms such as "branch," the McFadden Act continued to leave "the business of banking" undefined.

In 1914, the Federal Reserve System was created. No longer were banks responsible for issuing paper currency; the Federal Reserve Banks assumed that task. National banks turned to further developing the retail banking system -- developing and providing many of the convenient financial products and services enjoyed by individual customers today -- and expanding the nation's capital strength through the reinvestment of accumulated consumer savings.

A watershed moment in the history of American banking was the Great Depression: "[M]ore than any other business, commercial banking was especially hard hit." Robertson, *supra*, at 118. As the economy ground to a halt, so did the business of banking.[7] In the words of one historian, the collapse of the American banking system "had very nearly destroyed the edifice of American capitalism." *Id.* at 125. To ensure that that edifice remained intact, the Federal Deposit Insurance Corporation (FDIC) was created. FDIC deposit insurance and the continued growth of multi-branch and multi-unit banking led the way to the banking system's restored stability. *See generally id.*

The present era of remarkable metamorphosis began in the 1950s. Competition has been one factor in this acceleration of change. Banks of the mid-1950s were "inclined toward more aggressive competition than had been witnessed for a generation." *Id.* at 144. Also, among other factors, technology has become a major driving force behind the sea change in the business of

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[7]For four days in 1933, President Roosevelt declared a "bank holiday," and "the business of banking" was restricted to making change, cashing government checks, and switching checks to drawers' accounts so long as no cash payment was required. Ross M. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* 122 (1968).

banking.[8] Traditionally, people and businesses relied on bank deposits to hold their savings;[9] now, banks are no longer the only institutions engaged in what used to be thought of as "banking."[10] More recently, the advent of improved telecommunications and computer technology, particularly the ability to manipulate large volumes of data, has not only reshaped the delivery system of banks but also remade the various types of financial products available today, including deposit-like vehicles such as money market funds and hybrid bank-investment and insurance-related products. Significantly, such product developments as mutual funds result in bank-like liquidity offered by

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[8]"Conceptually, what had made a bank unique was its ability to create money. . . . Operationally, what had made a bank unique was that it could handle the storage and payment of money, an immense job requiring armies of tellers at windows and clerks with ledgers and sorters who stood before honeycombs of pigeonholes to slot checks . . . . Then came the computer." Mayer, *supra* note 3, at 6, 7, 8.

[9]Indeed, as recently as 1963, this Court embraced a traditional borrowing-lending-depositing view of banking. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326-27 n.5 (1963).

[10]By the late 1950's,

> commercial banks were collectively under the pressure of competition from a group of financial institutions known as nonbank intermediaries. These institutions -- notably savings and loan associations, life insurance companies, mutual savings banks, credit unions, and uninsured pension funds -- were making inroads on commercial-bank business before World War II, but it was not until after the war that they seemed to pose a serious threat. In particular, savings and loan associations waged vigorous campaigns to capture both the savings and the customer loyalty of American households, and the banking community became concerned that the S & Ls would soon be given wider lending and investment privileges.

Robertson, *supra* note 7, at 144.

nonbanking competitors, indistinguishable for all important purposes from "banking". Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich. L. Rev. 672, 677-78 (1987). *See also* Symons, *supra*, 51 Geo. Wash. L. Rev. at 677. The money-market fund itself is a direct competitor to banks' traditional deposit business. Relying on the essential statutory flexibility of 12 U.S.C. § 24 (Seventh), banks have responded by developing similar highly-competitive products.

On the lending side, banks are no longer the only or principal source of lending. Unregulated non-banks increasingly provide financial products similar to those available from banks. Richard M. Whiting, *A Perspective On Financial Services Restructuring*, 37 Cath. U.L. Rev. 347, 361 (1988). *See generally* Mayer, *supra*, at 34-71. Significantly, finance companies and insurance companies have now displaced commercial banks as the major providers of consumer installment credit. *The Recent Performance of the Commercial Banking Industry*, Fed. Reserve Bank of N.Y.Q. Rev. 3, 5-6 (Summer 1986). *See generally* Whiting, *supra*, 37 Cath. U. L. Rev. at 361-62. Trust departments, pension funds, and insurance companies all loan money on a short-term basis, frequently accepting rates of interest lower than those demanded by commercial banks. Langevoort, *supra*, 85 Mich. L. Rev. at 679. And "[t]hrough the so-called commercial-paper market, high-quality corporate borrowers have tapped this demand [for short-term loans], utilizing communications and record-keeping technology that permits efficient matching and transactions between themselves and their creditors. By issuing commercial paper instead of borrowing from a bank, corporations effectively eliminate the intermediary in their acquisition of capital." *Id.* (footnote omitted).[11]

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[11]By the spring of 1982, the quantity of commercial paper on the market reached 80% of the quantity of commercial and industrial loans of the entire American banking system. Mayer, *supra* note 3, at 26.

Advances in technology and increased unregulated competition have dramatically affected profits and risks in areas traditionally recognized as the core business of banking. The changing financial services landscape has eliminated some of banks' most profitable borrowers and correspondingly pressured those banks to make lower-quality loans to higher credit risks in order to compensate for the loss of the better business. *See* 48 Banking Rep. (BNA) 152 (Jan. 19, 1987). With the loss of much of their traditional businesses, banks have necessarily looked in other directions for business. In short, "banks, as we have known them, should be seen as creatures of a time when information was expensive. . . . Now, technologically, any number can play [in the financial services market]; and the old games with their rigid rules and limited participation are gone forever." Martin Mayer, *The Money Bazaars* 378-79 (1984).[12]

Although "the business of banking" has changed significantly since 1863, the statute remains the same.[13] "[C]ommentators

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[12]*See also* Arthur F. Burns, *The Ongoing Revolution in American Banking* 25 (1988):

> By 1980 banking had changed fundamentally. In the new era banks found themselves competing vigorously at home and abroad for the business of depositors and borrowers who were becoming more sophisticated, whose needs were growing more complex, whose operations for meeting their needs were continually expanding, and whose decisions were now likely to turn on fractions of a percentage point and interest rates rather than on number of years of personal acquaintance.

[13]While there have been notable efforts in other statutes to define terms such as "bank," *see, e.g.*, 12 U.S.C. § 1841(c) (1988), Congress has refused for 129 years to define "the business of banking" in the National Bank Act. It is thus clear that notions of what "the business of banking" *is* continue to evolve, and this evolution has confounded even the most notable authorities. *See, e.g.*, Mayer, *supra* note 3, at 4 (noting "dilemmas" of Federal Reserve Board and quoting Chairman Paul

uniformly have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). *Cf. Oklahoma ex rel. State Banking Bd. v. Bank of Okla.*, 409 F. Supp. 71, 84, 90-91 (N.D. Okla. 1975) (concluding that although automated teller machines (ATMs) were unknown in 1927, at the time of the adoption of the McFadden Act, the Comptroller's view, that ATMs were incidental to the business of banking and not "branches," was entitled to great weight). Because of technological developments and market forces, the banking industry changed and must continue to change to survive. "While the functions historically performed by banks continue to grow in significance, the role of bankers in performing them has already diminished and will be reduced further. The future of banking is up for grabs, and there are many grasping hands in the air." Mayer, *supra*, at 4.

### 2. The Comptroller Has Played a Pivotal Role in Developing "The Business of Banking."

The National Bank Act recognizes and amply accommodates the evolutionary character of banking by providing undefined and flexible authority for banks, under the guidance and direction of the Comptroller, to define "the business of banking" in response to marketplace considerations. That same Act established the Comptroller to have pervasive regulatory authority of national banks, thus empowering him to interpret "the business of banking" in light of changing economic conditions and technology. Even the Second Circuit recognized the Comptroller's

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Volcker as stating "My instinct is that there's something unique about a bank."); Douglas H. Ginsburg, *Interstate Banking*, 9 Hofstra L.Rev. 1133, 1137 (1981) ("What is 'the business of banking'?"). Even a leading treatise on banking law skillfully evades a definition of "the business of banking." *See* 1 Raymond Natter, *et al.*, *Banking Law* § 1.03, at 1-6 to 1-8 (1992).

special role in giving meaning to the National Banking Act. *See* Chase Pet. at 10a[14] (citing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987)). Since the Comptroller "possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress," *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971), the long-term evolution of "the business of banking" is "within [his] area of special expertise," *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

Courts have recognized the special regulatory authority of the Comptroller, noting that the preparation of a comprehensive charter to guide "the business of banking" over time is a function belonging solely to the Comptroller of the Currency. *M & M Leasing*, 563 F.2d at 1384. *Accord American Ins. Ass'n v. Clarke*, 865 F.2d 278, 282 (D.C. Cir. 1988) (noting Comptroller's "expert financial judgment"). Congress originally recognized in the enactment of the National Bank Act that a legislature is not itself equipped to continuously adjust the banking laws to accommodate the rapid changes in the banking business, since most banking legislation is necessarily backward-, rather than forward-looking.[15] Indeed, Congress itself has reaffirmed the expansive flexibility of the law by leaving unaltered a long line of expansive Comptroller interpretations. The only institution well-equipped to guide and define the evolution of "the business of banking" is the Comptroller of the Currency. In recognition of the Comptroller's role, one federal appeals court said long ago that "[c]ourts have nothing to do with determining the policy which national banks should pursue. That is a question for the Comptroller of the Currency and the banks themselves so long as

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[14]Citations to "Chase Pet." are to Chase Manhattan Bank, N.A.'s Petition for Writ of Certiorari.

[15]"[M]uch of commercial bank regulation in this country is aimed at weaknesses, real or fancied, that became apparent in depressions long since forgotten." Robertson, *supra* note 7, at 7.

that policy is not unlawful and does not offend against public policy." *Baltimore & Ohio R.R. v. Smith*, 56 F.2d 799, 802 (3d Cir. 1932).

The Comptroller has provided this long-term guidance principally through his power to define what incidental powers are "necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). One of the factors which the Comptroller has traditionally considered in determining what is necessary to carry on the business of banking is the need for national banks to meet their competition.[16] One of the principal objectives of bank regulation is to oversee and promote the financial soundness of banking institutions. Robert C. Clark, *The Soundness of Financial Intermediaries*, 86 Yale L. J. 1 (1976); Michael Mussa, *Competition, Efficiency, and Fairness in the Financial Services Industry*, in *Deregulating Financial Services: Public Policy in Flux* 121, 128-35 (George G. Kaufman & Roger C. Kormendi eds., 1986). To this end, the Comptroller has interpreted § 24(Seventh) to authorize national banks to engage in leasing activities,[17] real estate appraisal services,[18] real estate asset management and advisory services,[19] investment advice,[20]

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[16]This has long been established as an appropriate criterion under § 24(Seventh). *See, e.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377 (1954); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 49 (1940); *First Nat'l Bank v. Hartford*, 273 U.S. 548, 558 (1927).

[17]Comptroller Interp. Letter No. 369, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,539 (Sept. 25, 1986). *See generally* 12 C.F.R. § 7.3400 (1992).

[18]Comptroller Interp. Letter No. 467, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691 (Jan. 24, 1989).

[19]Comptroller Interp. Letter No. 389, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,613 (July 7, 1987).

computer processing and telecommunications services,[21] electronic switching systems for automated teller machines,[22] and data processing.[23] The Comptroller explicitly recognized the need for national banks to fairly meet their competition in his 1986 interpretive letter allowing banks to sell title insurance. Chase Pet. 41a.[24]

### B. The Second Circuit Erred in Denying The Comptroller Authority To Approve Certain Insurance Activities as an Important Element of The Modern Business of Banking.

The Second Circuit's broadly-drawn holding, that § 92 prohibits national banks from acting as agents for "'any . . . insurance company'", Chase Pet. 14a, contravenes long-standing and reasonable interpretations of § 24(Seventh) by the Comptroller which have been upheld by federal Courts of Appeals

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[20]Comptroller Interp. Letter No. 367, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,537 (Aug. 19, 1986).

[21]Comptroller Interp. Letter No. 381, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,605 (May 5, 1987).

[22]Comptroller Interp. Letter No. 382, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,606 (May 5, 1987).

[23]Comptroller Interp. Letter No. 345, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,515 (July 9, 1985).

[24]The thin legislative history of § 92 relied upon by the Second Circuit illustrates that competition has long been a special area of the Comptroller's concern. The letter of Comptroller Williams, proposing legislation that would become § 92, noted that its purpose was to provide banks in small communities "with additional sources of revenue." 53 Cong. Rec. 11,001 (1916).

in the past. By construing the implied limitations of § 92[25] together with § 24(Seventh)'s incidental powers provision, the Comptroller has interpreted the banking laws to allow national banks to develop and sell various insurance-related products, *e.g.*, debt cancellation contracts,[26] municipal bond insurance,[27] and credit-related life insurance.[28] These developments have undoubtedly benefitted consumers by ensuring the efficient and price-competitive availability of such financial products.

As Petitioner Chase has correctly pointed out, the plain language of § 92 leads to the conclusion that Congress meant only to grant national banks in small towns an additional income

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[25]Notwithstanding *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *cert. pending* (Nos. 92-484 and 92-507), your *amici* have assumed, throughout this brief, that § 92 remains in full force and effect. Should this Court affirm in Nos. 92-484 and 92-507, your *amici* contend that that result would compel reversal of the Second Circuit's judgment, since the "implied bar" of § 92 found by the Second Circuit would no longer exist to limit the Comptroller's powers under § 24(Seventh).

[26]*See* 12 C.F.R. § 7.7495 (1992) (debt cancellation contracts are similar to credit life insurance) *and First Nat'l Bank v. Taylor*, 907 F.2d 775, 777-78 (8th Cir.), *cert. denied*, 111 S. Ct. 442 (1990).

[27]*See* Comptroller Interp. Letter No. 338 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508, at 77,792 (May 2, 1985) *and American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[28]*See* 12 C.F.R. § 2.6 (1992); Comptroller Interp. Letter No. 277 [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441 (Dec. 21, 1983) (underwriting credit life insurance, which is much riskier to banks' financial well-being than an agency arrangement. *See* Stephen K. Huber, *Insurance Powers of Banking Organizations*, 8 Ann. Rev. Banking L. 147, 149 (1989)); *and Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

source. There is thus no need to resort to canons of construction, as did the Second Circuit, to elucidate the plainly-expressed meaning of § 92. *See Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last.").

By resorting to a second canon of construction beyond the four corners of the statute, the Second Circuit implicitly found § 92 ambiguous. But it is clear that if there is an ambiguity, the Second Circuit did not go far enough to resolve it. The Second Circuit, following *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), applied the maxim *expressio unius est exclusio alterius* and concluded that Congress, by explicitly empowering national banks in places of 5,000 or fewer people to sell "any fire, life, or other insurance", implicitly meant that national banks in all other places were *not* empowered to sell such insurance. The Second Circuit specifically noted that if Congress believed that all national banks already possessed this authority, "this provision would have been superfluous." Chase Pet. 12a.

Such logic fails entirely in light of the fact that the activities encompassed within "the business of banking" have evolved under the Comptroller's supervision. Congress' grant of explicit authority to sell insurance in small towns thus must be viewed as a decision positively to establish that authority, rather than to rely on the evolutionary process which would otherwise govern. The Comptroller's decision to allow sales of certain types of insurance in areas other than those covered by § 92 is consistent with the continued evolution of "the business of banking". Congress simply meant to be very clear about the existence of such authority in small towns.

In reaching its result, the Second Circuit held that "any fire, life, or other insurance" as used in § 92 means "any insurance," despite the fact that Congress did not write it that way. Chase Pet. 14a. It should have applied the maxim of *noscitur a sociis*

to interpret what "other insurance" in § 92 means.[29] This is what the Comptroller did. In his 1986 interpretive letter, the Comptroller recognized the *expressio unius* rationale of *Saxon*, see Chase Pet. 42a, but concluded that "title insurance . . . . is sufficiently unlike life, property, and casualty insurance to justify treating it differently from these forms of insurance for regulatory purposes." *Id.* at 41a-42a.[30]

The Comptroller's construction deserved deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Comptroller's interpretation of § 24(Seventh) and § 92 of the National Bank Act was a reasonable one, and the Court of Appeals should have deferred to it. By picking the canon most relevant to their result, but eschewing the canon relied upon by the Comptroller in issuing his interpretive letter, the Second Circuit effectively usurped the role of the Comptroller, a role flatly foreclosed to it by *Chevron*.

National banks have ordered their affairs based on the Comptroller's interpretations of § 92 which have been affirmed by various courts of appeals. The national banks represented by your *amici* have relied on being able to sell various forms of limited purpose insurance to enable them to stay competitive in the financial services market. To now upset the Comptroller's reasonable interpretation of § 92 and 12 U.S.C. § 24(Seventh) could have the effect of seriously upsetting the settled business

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[29]This Court has adhered steadfastly to the rule that words grouped in a list should be given related meaning. *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207, 218 (1984).

[30]This letter also recognized that, as part of their business, "banks traditionally have been involved in the title insurance business." Chase Pet. 41a.

expectations of an already-disadvantaged industry. This Court has shown a special solicitude for continuity "in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991). The same special solicitude should have been granted to the Comptroller's long-standing conclusion that the sale of certain insurance products is an incidental power necessary to the business of banking. *See, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978) (administrative interpretation sustained in view of "substantial reliance interests").

As Justice Frankfurter presciently remarked over fifty years ago, "when Congress has spoken at best with ambiguous silence -- a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress." *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940). Given the reasonableness of the Comptroller's interpretation of the National Bank Act, the reliance thereon by national banks, and the need of those banks to compete with the less-fettered "financial services industry" for their survival, the Second Circuit should not have invalidated a permissible construction of a statute which the Comptroller reasonably has determined makes the selling of title insurance incidental to "the business of banking."

In large part due to the statutory flexibility embodied in the incidental powers clause of § 24(Seventh), "the business of banking" has not remained static and is not the same as it was in 1863, or even in 1963. Banks, with the continuous guidance of the Comptroller, have heretofore been able to meet and lead in the development of financial products and services, constrained only by the agency and when Congress has seen fit to explicitly intercede (as it did to constrain investment banking practices via the Glass-Steagall Act). Against the backdrop of the recent S & L crisis, and predictions that a national bank crisis looms, the Comptroller is best able to take into account the need for banks

to compete fairly with their competitors in order to survive. If not reviewed, the Second Circuit's decision will eliminate important business opportunities, diminish significantly national banks' ability to compete profitably, and seriously endanger the evolution, let alone the future, of the business of banking.

## CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

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Nos. 92-482 and 92-645

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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STEPHEN R. STEINBRINK, IN HIS OFFICIAL CAPACITY AS ACTING COMPTROLLER OF THE CURRENCY, AND THE OFFICE OF THE COMPTROLLER OF THE CURRENCY,
*Petitioners,*

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

With the consent of the parties pursuant to Rule 37.2 of this Court, *amicus curiae* The New York Clearing House

Association (the "Clearing House") respectfully submits this brief in support of the petitions for a writ of certiorari (the "Petitions") filed, respectively, by The Chase Manhattan Bank, N.A. ("Chase") and by the Solicitor General on behalf of the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency (the "OCC").

## INTEREST OF *AMICUS CURIAE*

The Clearing House is an unincorporated association of eleven leading commercial banks in the City of New York, including Chase.[1] Five of the Clearing House member banks are national banking associations subject to the National Bank Act (the "NBA")[2] and the supervision and guidance of the OCC. The Clearing House regularly appears as an *amicus curiae* in cases concerning important questions of law relating to banking.

The Clearing House's interest in the issues presented in the Petitions derives both from the member banks' interest and involvement in the sale of title insurance and other types of insurance-related products that are incidental to the business of banking, and from the member banks' shared concern for the recognition and consistent application of clear and certain rules of law to the business of banking.

In addition to Chase, other Clearing House member banks are interested in acting as agents for the sale of title

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[1] The other members of the Clearing House are The Bank of New York, Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

[2] Ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of 12 U.S.C.)

insurance. Member banks are also interested in the sale of other insurance-related products permitted under Section 24 (Seventh) of the NBA, 12 U.S.C. § 24 (Seventh) ("Section 24 (Seventh)"). The products that national banks are authorized to sell include municipal bond insurance, credit life insurance, credit disability insurance, mortgage life insurance and mortgage disability insurance.

The Second Circuit's decision here creates a double conflict with decisions of the United States Court of Appeals for the D.C. Circuit that gives rise to crippling uncertainty within the commercial banking industry. Specifically, the decision below conflicts directly with the D.C. Circuit's holding in *Independent Ins. Agents of America* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, Nos. 92-484 & 92-507, that Congress has repealed 12 U.S.C. § 92 ("Section 92"). In addition, the Second Circuit's holding that Section 92 impliedly bars national banks in jurisdictions of more than 5,000 inhabitants from engaging in insurance-related activities that are incidental to the business of banking is inconsistent with the D.C. Circuit's determination in *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), that Section 92 does not prohibit national banks, wherever located, from brokering credit life insurance. The exercise of this Court's plenary jurisdiction is necessary to resolve both conflicts.

Clearing House member banks and other national banks that are engaged in the sale of insurance-related products are now left to guess as to the scope of their authority and the stability of the business relationships into which they have entered. Such confusion inevitably deters national banks from exercising the full extent of their powers under the NBA and thereby impedes their ability to compete effectively with other financial institutions in a difficult economic environment and

inhibits them from pursuing potentially lucrative commercial opportunities.

## SUMMARY OF ARGUMENT

This Court should grant certiorari to settle the uncertainty concerning the permissible scope of national bank powers under Sections 92 and 24 (Seventh). The decision below creates a conflict between the Second and D.C. Circuits as to whether Section 92 was repealed by Congress and, if not, whether Section 92 impliedly bars national banks located in municipalities with more than 5,000 inhabitants from acting as agents for the sale of title insurance and other insurance-related products. This conflict has created confusion within the commercial banking community as to the permissible scope of national bank powers and uncertainty regarding the insurance-related activities in which Clearing House member banks and other national banks currently engage.

At a minimum, the conflict of authority engenders anomalous geographic distinctions resulting in competitive inequities. National banks in the Second Circuit are authorized to engage in the range of activities permitted by Section 92, whereas national banks located in circuits that follow the D.C. Circuit's holding would lack such authority. By contrast, attempts could be made to extend the Second Circuit's construction of Section 92 to prohibit national banks in the Second Circuit from conducting banking activities under Section 24 (Seventh) that are available to national banks in other jurisdictions. The Second Circuit's opinion would, thus, allow matters that are of importance to the financial community to depend upon the happenstance of a bank's location. Aside from these conflicts, the Second Circuit's misconstruction of Section 92 potentially has serious adverse consequences for all national banks because it could provide the basis for litigation seeking to deprive national

banks of the power to engage in a wide range of activities that have been authorized, and are being conducted, as incidental to the business of banking under Section 24 (Seventh).

In addition, the Second Circuit's disregard for and sharp departure from established principles of judicial deference to administrative interpretations and for the precedent interpreting Section 92 undermine the ability of banks to proceed, frequently expending significant time and money, in reliance on the interpretations of the OCC and other banking agencies. In its opinion below, the Second Circuit acknowledged its obligation to defer, in the absence of clear congressional intent to the contrary, to the reasonable interpretation of a statute by the agency charged with its administration. However, the court then proceeded to ignore this obligation and the explicit language of Section 92 supporting the OCC's determination in this matter and to substitute its own construction of the statute. By paying mere lip service to the principle of judicial deference while undercutting its application, the Second Circuit has opened the door to inconsistent interpretations and applications of the rules governing commercial banking relations and has robbed national banks of essential confidence in the determinations of the OCC.

## ARGUMENT

### A. The Conflict Between the Second and D.C. Circuits Regarding the Existence of Section 92 Creates Confusion for the Commercial Banking Industry.

In holding that Section 92 remains valid law, the Second Circuit disagreed with a recent decision of the D.C. Circuit which had held that that section had been repealed by the

omission of the pertinent text from a 1918 reenactment of Section 5202 of the Revised Statutes of the United States. *See Independent Ins. Agents of America* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, Nos. 92-484 & 92-507. This dispute as to the existence of Section 92 will likely recur in other circuits,[3] and creates intolerable confusion for all national banks. Moreover, the resolution of this conflict could have a significant impact on judicial construction of the scope of the powers granted to national banks under Section 24 (Seventh). If this Court were to hold that Section 92 had been repealed, that statute could not — contrary to the Second Circuit's holding — "impliedly bar" national banks in municipalities of more than 5,000 inhabitants from brokering title insurance. The only remaining issue, then, would be the one that the Second Circuit declined to reach, *i.e.*, whether national banks are permitted to act as agents for the sale of title insurance under Section 24 (Seventh). (*See* Chase Petition at 13).

The uncertainty as to the existence of a provision of the NBA that was enacted more than seventy-five years ago is plainly detrimental to the coherent development and application of the rules governing the activities of national banks.[4]

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[3] *See, e.g.*, *Owensboro National Bank* v. *United States*, No. 91-3 (E.D. Ky, Aug. 4, 1992), in which the court rejected a challenge to the validity of Section 92 that had been raised "[r]elatively late in the briefing of [that] case," and agreed "with the rationale of the Second Circuit" below. *Id.*, slip op. at 14-15.

[4] Although courts and commentators have previously acknowledged that there may be some doubt as to Section 92's repeal, no direct conflict between circuits has arisen until now. Prior to this conflict, the courts and the OCC generally assumed that Section 92 continues to exist. For example, in *Commissioner of Internal Revenue* v. *First Security Bank of Utah*, 405 U.S. 394, 401, n.12

(continued...)

As a result, the split of authority creates confusion as to the stability of existing arrangements entered into by national banks pursuant to Section 92 and the ability of national banks to continue to engage in such activities in the future. Currently, approximately 179 national banks in fifteen states conduct insurance-related activities pursuant to Section 92. *See Owensboro National Bank* v. *United States*, No. 91-3, slip. op. at 10 (E.D. Ky. Aug. 4, 1992). The conflict between the circuit courts is especially significant because these national banks have expended, and continue to expend, substantial effort and expense to develop programs and business relationships for providing the products and services permitted under Section 92. Unless this Court resolves this

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[4](...continued)

(1971), this Court noted without further comment:

> Section 92 of the National Bank Act was enacted in 1916. When the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code. However, the Comptroller of the Currency considers § 92 to be effective and he still incorporates the provision in his Regulations, 12 C.F.R. §§ 2.1-2.5 (1971).

*See also First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980); *Independent Ins. Agents of America, Inc.* v. *Board of Governors*, 736 F.2d 468, 476-77 (8th Cir. 1984); *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert denied*, 449 US. 823 (1980); *Commissioner of Internal Revenue* v. *Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966).

Commentators similarly have expressed the view that Section 92 technically was repealed as a result of the "error of a careless codifier," but remains valid law. Howard H. Hackley, *Our Baffling Banking System - Part II*, 52 Va. L. Rev. 771, 778 (1966); *see also* Richard M. Whiting & James E. Scott, *A Guide to the Federal Law of Banking and Insurance* § 4.2(a), at 81 n.31 (1991)..

conflict, national banks would be left with the unenviable dilemma of either refraining from pursuing this significant source of revenue or continuing to engage in activities that are now subject to question.

The conflict also engenders arbitrary geographic distinctions within the commercial banking industry. National banks located in towns of fewer than 5,000 inhabitants within the Second Circuit, or in any circuit that does not follow the D.C. Circuit's holding, would continue to be able to offer their customers general forms of insurance, such as fire and life insurance, pursuant to Section 92. By contrast, any court applying or following the D.C. Circuit's holding would prohibit national banks in similar locations from engaging in such activities.

Indeed, the conflict may well impair the ability even of national banks located within the Second Circuit to engage in insurance activities under Section 92. In view of the intercircuit conflict, the OCC may be reluctant to lend necessary interpretive guidance concerning the application of Section 92. Moreover, because, under 28 U.S.C. § 1391(e), venue for actions against the OCC or the Comptroller of the Currency could lie in the District of Columbia, even an OCC authorization to a national bank in the Second Circuit to sell certain forms of insurance could be challenged in the courts of the D.C. Circuit, which may prohibit the bank from engaging in such activities. As a result, the possibilities for unseemly forum shopping created by the conflict are obvious. More importantly, national banks located in the Second Circuit are now confronted with constant uncertainty as to whether their authority to engage in acts permitted by their home circuit could be revoked through chance litigation in a distant court.

The conflict between the circuits regarding the existence of Section 92 has created disruptive confusion and clearly

impairs the orderly recognition and coherent application of rules of banking law. Only review by this Court can restore the necessary certainty and uniformity.

### B. The Second Circuit's Decision Conflicts With the D.C. Circuit's Determination That Section 92 Does Not Bar National Banks in Towns of More Than 5,000 Inhabitants from Engaging in Certain Insurance-Related Activities, and Engenders Uncertainty for National Banks.

The Second Circuit's holding that Section 92 "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general," (OCC Appendix at 16a)[5] conflicts with the D.C. Circuit's determination in *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), that Section 92 does not prohibit national banks from brokering credit life insurance under the incidental powers clause of Section 24 (Seventh). In *Heimann*, the D.C. Circuit rejected the rationale that later premised the Second Circuit's holding, concluding instead that, "[b]y its own terms, [Section 92] does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Id.* at 1170 & n.18.

As is the case with respect to the conflict concerning the existence of Section 92, this division engenders irrational geographic distinctions regarding the permissible scope of national bank powers. National banks located within the Second Circuit are precluded by the decision below from

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[5] Citations in the form of "OCC Appendix at __" are to the Appendix to the Petition filed by the Solicitor General.

brokering title insurance, while courts following *Heimann* would not interpret Section 92 to bar such activity. Thus, the Second Circuit's decision unfairly deprives national banks located within that circuit of a potentially important source of revenue.[6] This discrepancy significantly prejudices the competitive position of the Clearing House members that are national banks, which generate billions of dollars in real estate loans annually.

Moreover, as the Petitions demonstrate (Chase Petition at 15-16; OCC Petition at 17-18), national banks in all jurisdictions presently engage in a wide range of other activities that are incidental to the business of banking.[7] As a result of the current circuit conflict, however, a national bank's continued authority to engage in such activities could depend solely upon the fortuity of the bank's location. The Second Circuit's holding concerning the brokerage of title insurance might improperly be extended to preclude national banks from performing these other insurance-related activities, even though national banks located outside the Second Circuit may engage in such conduct. Thus, the Second Circuit's decision threatens to deprive national banks of important business opportunities and impairs their ability to compete with state banks, savings and loan associations and other financial institutions that are permitted to offer insurance-related products. In any event, the uncertainty regarding the reach of

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[6] As this Court recognized in *Federal Trade Commission* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2173 (1992), the title insurance industry earns revenues in excess of a billion dollars per year.

[7] Among the insurance-related products that national banks have been authorized to offer as agents are municipal bond insurance, credit related life insurance, mortgage life insurance, credit disability insurance, involuntary unemployment insurance and vendor's single interest insurance. (OCC Petition at 17-18; Chase Petition at 15-16).

the Second Circuit's decision could mire national banks in endless litigation that would distract them from their banking activities and compel them to expend substantial resources to defend against challenges to their operations.

The conflicting interpretations of Section 92 create fundamental confusion as to both the ability of national banks to continue to engage in these activities and the stability of the brokerage agreements and other business arrangements relating to these services. In reliance upon the post-*Saxon*[8] judicial decisions construing Section 92 and the OCC's approval of national banks' involvement in these activities, national banks have invested—and continue to invest—substantial effort and expense to develop programs and commercial relationships for carrying out these activities. The confusion resulting from the conflict between the circuits threatens the commercial banking industry with gridlock that could hinder, if not prevent, national banks from proceeding with these projects and subjects current business arrangements and relationships to uncertainty.[9]

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[8] *See Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968).

[9] Moreover, to the extent that national banks are deterred by this uncertainty from brokering insurance-related products that are incidental to the business of banking under Section 24 (Seventh), consumers of those products would be deprived of alternative sources of those products and of the salutary benefits of competition among the providers of those products.

### C. The Decision Below Fails to Follow the Principles of Judicial Deference Outlined in *Chevron* and Undermines the Reliability of OCC Interpretations of the NBA.

The Second Circuit's departure from the basic principle of judicial deference in its unwarranted reversal of the OCC's determination, which was based on the OCC's entirely rational interpretation of the NBA, has serious adverse repercussions for the commercial banking industry. The OCC is the federal agency specifically charged with the supervision and regulation of national banks and the administration of the NBA. In the conduct of their daily business, national banks, including a number of the Clearing House member banks, are compelled by law and business necessity to rely on the OCC's interpretations of the permissible scope of national bank activities. Regulatory predictability and stability are indispensable to the business of commercial banking, and judicial invalidation of entirely rational OCC determinations is highly disruptive.

More generally, banks are subject to a comprehensive statutory scheme of regulation that pervades every aspect of their operations and procedures. Many aspects of this scheme are specifically left to implementing regulations of the banking agencies. Other aspects of this scheme, particularly those that were enacted many years ago, require interpretation and, frequently, reinterpretation in order to account for financial, economic and technological developments. If banks cannot rely on the regulations and interpretations promulgated by their regulators, they would be unable to serve the demands and needs of their customers and their competitive position and earnings would inevitably deteriorate.

This Court has long recognized the necessity of deferring "to [a regulatory agency's] construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnotes omitted); *See also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987) (applying the *Chevron* principle to the OCC's interpretation of federal banking laws). *Chevron* establishes the following framework for review of such agency interpretations: First, a court must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the issue addressed by the regulatory determinations, the reviewing court should assess only whether the agency's interpretation is based on a "permissible construction of the statute." *Id.* at 842-43.

The bank regulators are not, of course, immune from judicial reversal when they depart from the clear intention of a statute. However, the courts may substitute their judgments for those of the regulators only in the case of such a departure, and not when the regulators' interpretation "is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843 & n.11; *see also, Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-404.

The OCC consistently has construed Section 92 as a *supplemental* grant of authority providing additional sources of revenue for national banks located in small towns, and not as an exclusive source of insurance powers. *See, e.g.*, Comptroller Interpretive Ltr. No. 499, *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 at 71,213 (Feb. 12, 1990) (national banks permitted to broker annuities). As the Petitions demonstrate (OCC Petition at 11-13; Chase Petition at 14-17), this interpretation is supported

both by the language and legislative history of the statute and by recent judicial interpretations of Section 92.[10]

The Second Circuit acknowledged its obligation under *Chevron* to give effect to the unambiguously expressed intent of Congress and recognized that, where the statute is silent or ambiguous with respect to the matter at issue, the court should inquire only as to whether the OCC's interpretation is "'arbitrary, capricious or manifestly contrary to the statute.'" (OCC Appendix at 12a) (quoting *Chevron*). It nonetheless rejected the OCC's position, stating simply that "we believe that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents." (OCC Appendix at 13a). The court took this position although it conceded that Section 92 "provides no explicit limitation on national bank activity." (*Id.* at 13a).

It is difficult to conceive of a more direct repudiation of *Chevron*. In the first instance, the court ignored the explicit statement in Section 92 that the powers conferred by that section were "*in addition* to the powers vested by law in national banking associations." 12 U.S.C. § 92 (emphasis added). This statement clearly indicates that Congress had authorized national banks to engage in *other* insurance powers *in addition* to those granted under Section 92.

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[10] *See Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d at 1170, n.18 ("[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies"); *Independent Ins. Agents* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("[t]he legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance").

As the Petitions demonstrate (OCC Petition at 11-16; Chase Petition at 19-24), the court attempted to support its strained contrary construction of Section 92 by the maxim of *expressio unius est exclusio alterius*, which it misapplied, and the legislative history of that provision, which it misinterpreted.

The use of these statutory construction tools is dubious at best in view of the clear statutory language. They are totally inappropriate under *Chevron* when used to overturn an administrative agency's determination that is not precluded by the maxim of *expressio unius* and can be read consistently with the legislative history. Even if it had been appropriate to apply the maxim of *expressio unius* in construing the statute, that analysis could have demonstrated at most that Section 92 impliedly bars national banks in municipalities with more than 5,000 inhabitants from engaging in general insurance activities if such activities are not incidental to the business of banking. Section 92 does not address—and, thus, the maxim cannot be invoked to restrict—the powers granted to national banks by Section 24 (Seventh) to engage in insurance-related activities that *are* incidental to the business of banking. (*See* Chase Petition at 23).

The Second Circuit also relied on legislative history that, in fact, demonstrates that Section 92 had been enacted to provide supplemental insurance powers to national banks in small towns, and not to prohibit the ability of national banks to engage in insurance-related activities that are incidental to the business of banking under Section 24 (Seventh). (OCC Petition at 12-15; Chase Petition at 23-24). In short, the legislative history supports the OCC's interpretation of Section 92 or, at least, raises sufficient ambiguity regarding the meaning of that provision to have required the Second Circuit to defer to the OCC's determination. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844.

Thus, although the Second Circuit purported to pay heed to the principles of judicial deference set out in *Chevron,* it, in fact, impermissibly substituted its own reading of Section 92 for that of the OCC, the agency specifically charged by Congress to interpret and administer the NBA. By failing to defer to the OCC's interpretation, the decision below paves the way for courts to supplant their construction of the NBA for the reasoned interpretations of the OCC, even where the regulator's interpretation is consistent with the statute's language and legislative history. Such an approach would result in piecemeal and inconsistent application of the federal banking laws and hinder the development of a coherent body of law for the national banking community.

## CONCLUSION

For the reasons stated in the Petitions and herein, certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

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Nos. 92-482, 92-645

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*
v.
AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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STEPHEN R. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
*Petitioner,*
v.
AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF AMICUS CURIAE OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS, NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether national banks may engage in the title insurance agency business outside of the limitation established by Congress in 12 U.S.C. 92, the only statutory enactment to address the permissible scope of insurance agency activities by national banks?

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## INTEREST OF AMICI

*Amici curiae* Independent Insurance Agents of America, Inc., National Association of Casualty & Surety Agents, National Association of Life Underwriters, and National Association of Professional Insurance Agents are non-profit national trade associations that represent hundreds of thousands of insurance agents and their employees throughout the United States. *Amici* are respondents in *United States National Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, No. 92-484, and *Steinbrink v. Independent Ins. Agents of Am., Inc.*, No. 92-507, which the Solicitor General has suggested should be treated the same as this case.

*Amici* have long maintained that their members' interest in sustaining and improving the insurance business environment is served by endorsing the separation of banking and insurance as provided under current law. In this regard, *amici* and their state affiliates have participated as parties and *amici* in numerous federal actions concerning the power of banks to engage in the business of insurance, including several cases that petitioners contend are relevant here. *See Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D.Ky. Aug. 4, 1992) (appeals pending); *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.); and *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

*Amici* fully support the arguments presented by Respondents and submit this brief to supplement those arguments.[1]

## INTRODUCTION AND SUMMARY OF ARGUMENT

In its decision below, the United States Court of Appeals for the Second Circuit unanimously held that na-

[1] All the parties to this action have consented to the filing of this *amicus* brief in support of Respondents. Their letters of consent have been lodged with the Court.

tional banks are not empowered by the National Bank Act (the "Act") to act as agents for insurance companies in the sale of title insurance. *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992) ("*ALTA*"). The court ruled that Section 92 of the National Bank Act limits national banks' incidental powers under Section 24 (Seventh) of the Act. The Court concluded that "the language of Section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents." *Id.* at 155. The Court further concluded that the contemporaneous legislative history "indicate[s] that when Congress enacted Section 92, it did so in the belief that under existing banking law (specifically 12 U.S.C. § 24 (Seventh)) national banks had no authority to engage in insurance agency activities. Furthermore, the Comptroller's [1916] letter provides evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance." *Id.* at 156.

Without having received briefing or hearing argument on the issue, the Second Circuit, as a preliminary point, *sua sponte* concluded that Section 92 had not been repealed, disagreeing with the D.C. Circuit's contrary holding in *Independent Ins. Agents of America v. Clarke*, 955 F.2d 731, *reh'g, en banc, denied*, 965 F.2d 1077 (D.C. Cir. 1992) ("*IIAA*") (petitions pending). By contrast, the D.C. Circuit, sitting *en banc*, considered fully-briefed arguments on both sides of the issue before declining to vacate the *IIAA* panel's ruling that Section 92 no longer exists.[2] The D.C. Circuit's well-reasoned decision in *IIAA*, effectively endorsed by the full court sitting *en banc*, correctly resolves the issue of Section 92's continued existence.

There is no meaningful conflict on this issue. Petitioners misread the Second Circuit's decision below in assert-

[2] No member of the full D.C. Circuit court voted to rehear the panel's decision regarding the existence of Section 92.

ing that there is such a conflict. To be sure the court, in *dicta*, disagreed with the D.C. Circuit's conclusion that Section 92 does not exist. But the key to the court's reasoning is that Section 92 was *enacted* in the first instance—a conclusion that no one challenges. Having enacted Section 92, Congress made clear its view that Section 24 (Seventh) does not provide for any insurance powers. The subsequent history of Section 92—whatever it is—sheds no additional light on the meaning of Section 24 (Seventh). Thus, the Second Circuit's decision below would be no different even if it had concluded that Section 92 was repealed. Moreover, the issues presented to the two courts, and the court's holdings, are very different. No one is subject to conflicting directives as a result of the two decisions. Further, the question of Section 92's continued existence may arise in two other Circuits and there is no need to address the issue now.

Nor does that portion of the Second Circuit's reasoning concerning the interaction of Section 92 and Section 24 (Seventh) warrant review by this Court. Contrary to petitioners' assertions, there is no real or direct conflict with the decisions of other courts; the reasoning is consistent with the language and legislative history of the Act; and the decision does not threaten national banks' previously-authorized insurance-related activities.

Petitioners' belief that national banks should be permitted to engage in a wide range of non-banking activities—including the sale of title insurance—should be addressed to Congress. This Court is not the forum for effectuating policy changes.

## ARGUMENT

### I. THERE IS NO REASON TO ADDRESS THE CONTINUED EXISTENCE OF SECTION 92.

The Chase Manhattan Bank, N.A. ("Chase") alone requests review of the Second Circuit's conclusion that Section 92 of the National Bank Act continues to exist. The Solicitor General, on behalf of the Office of the Comptroller of the Currency ("Comptroller"), pointedly refrains from raising that issue here, asking this Court instead to review the D.C. Circuit's ruling in *IIAA*. *Steinbrink v. Independent Ins. Agents of Am., Inc.*, No. 92-507. The issue does not warrant this Court's review in either case.[3]

#### A. There Is No Meaningful Conflict Between the Circuits.

Contrary to petitioners' representations, there is no meaningful conflict between the Second Circuit and the D.C. Circuit. The Second Circuit's conclusion below was *dicta*: the court need *not* have resolved the issue of Section 92's continued existence in order to conclude that national banks are not empowered to act as agents for title insurance companies. It is the *enactment* of Section 92 that evinces Congress' intent to limit national banks' power to sell insurance. Its subsequent history, however construed, cannot change this conclusion. Regardless whether Section 92 exists or not, national banks are not permitted to engage in the sale of title insurance as agents for insurance companies. For that reason, there was no necessity for the court to decide whether Section 92 had been repealed.

It is well-established that national banks are limited to those activities authorized them by law. *E.g., Texas &*

[3] *Amici*, respondents to the petitions seeking review of the D.C. Circuit's decision in *IIAA*, will more fully address the reasons why review of this issue is not warranted in their opposition brief in *IIAA*. That brief is due to be filed on November 21, 1992.

*Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 253 (1934); *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891). Congress enacted the predecessor of Section 24(Seventh) in 1863. Act of Feb. 25, 1863, Ch. 58, § 11, 12 Stat. 665, 668. Like the current version, the statute identified a series of express powers, and included the provision of "incidental" and "necessary" powers. *See* 12 U.S.C. § 24 (Seventh).

In 1916, then-Comptroller of the Currency, John Skelton Williams, wrote a letter to the Senate Banking and Currency Committee requesting that national banks located in small towns be permitted to act as insurance agents. 53 Cong. Rec. 11001 (daily ed. July 14, 1916).[4] The Comptroller expressed a desire to find a statutory mechanism whereby "the powers of small national banks might be *enlarged* so as to provide them with additional sources of revenue and to place them in a position where they could better compete with local State banks and with companies which are sometimes authorized under the law *to do a class of business not strictly that of commercial banking*." *Id.* (emphasis added). The Comptroller stated, however, that "from the standpoint of public policy and banking efficiency this authority should be limited to banks in small communities." *Id.* Accordingly, the Comptroller proposed an amendment to the National Bank Act. Explicitly noting that national banks were conferred "incidental" and "necessary" powers, Comptroller Williams explained that his proposed amendment was nevertheless required because "[n]ational banks are not given either expressly or by necessary implication the power to act as agents for insurance companies." *Id.*[5] Comptroller Wil-

[4] The letter was entered into the congressional record by Senator Owens.

[5] This view conformed with the opinion of the Board of Governors of the Federal Reserve, which held in 1915 that national banks had no authority, express or implied, to engage in insurance agency activities. The Board ruled that "[a]ny such *extension* of the powers of national banks must be left to the consideration of Con-

liams therefore clearly understood that a national bank's acting as agent for an insurance company was *not* an "incidental power . . . necessary to carry on the business of banking." *Id.*

In response, Congress enacted Comptroller Williams' proposed amendment. Act of September 7, 1916, Pub. L. No. 64-270, 39 Stat. 752-53 (the "1916 Act"). The critical language of the 1916 Act, provides:

> Section fifty-two hundred and two of the Revised Statutes of the United States [Section 13 of the Federal Reserve Act of 1913] is hereby amended so as to read as follows: . . .
>
> "That *in addition to the powers now vested by law in national banking associations* organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . ." (Emphasis added).

As the Fifth Circuit has recognized, prior to enactment of Section 92, "no national bank possessed *any* power to act as insurance agents." *Saxon v. Georgia Ass'n of Ind. Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968) (emphasis in original). By its explicit *addition* to national

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gress." 2 Fed. Reg. Bull. 73, 74 (Feb. 1, 1916) (emphasis added). At the time—as now—national banks were granted the power "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." *See id.* at 73.

banks' powers, Section 92 constituted the sole source of authority for national banks to engage in insurance-agency activities.[6] Section 92 was thought necessary precisely for the reason that, as was universally understood, national banks otherwise had neither the express nor incidental power to sell insurance. Section 92 thus reflects Congress' understanding that insurance-agency powers were beyond the powers conveyed by the other provisions of the National Bank Act—including the grant of "such incidental powers as shall be necessary to carry on the business of banking." *See Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. at 258 & n.13 (amendment to National Bank Act to provide limited power to pledge assets to secure deposits "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits") (citing legislative history similar to that of Section 92).[7]

In 1918, as the D.C. Circuit correctly ruled in *IIAA*, Congress repealed Section 92. Section 92 is the only statutory enactment that has ever addressed the insurance agency powers of national banks. The effect of Congress'

[6] *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."); *National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 458 (1974) (same); *Midland Telecasting v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir.) ("The existence of a specific [statutory] exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions."), *cert. denied*, 449 U.S. 954 (1980).

[7] The Court noted in *Pottorff* that the fact that Congress enacted the limited power in a separate section, rather than as an amendment to Section 24(Seventh), indicates that Congress did not mean merely to clarify that the power of a national bank to pledge its assets to secure deposits was contained in the grant of "incidental" powers. 291 U.S. at 259. Similarly, the enactment of the limited insurance-agency authority in a separate statutory provision (Section 92) refutes any suggestion that it was merely a clarification of powers already conferred by Section 24(Seventh).

repeal of Section 92 is thus plain: there is no longer *any* authority for national banks to sell insurance. The repeal of Section 92 reinforces Congress' intention to deprive national banks of even the limited authority to sell insurance in small towns that it briefly permitted from 1916 to 1918. Congress thus reinstated the law as it existed prior to Section 92's enactment: "no national bank possesse[s] *any* power to act as insurance agents." *Saxon*, 399 F.2d at 1016 (emphasis in original).

Yet the Comptroller, in his decision at issue in this case, has authorized national banks to engage in this very activity. He has authorized Chase to act as agent for title insurance companies. This is precisely the power once permitted (in small towns only) that Congress rescinded in 1918. As Comptroller Williams recognized 75 years ago, "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." 53 Cong. Rec. 11001 (daily ed. July 14, 1916).

Thus, contrary to petitioners' assertions, even if this Court were to grant review and determine that the Second Circuit incorrectly ruled on Section 92's continued existence, that determination would not alter the outcome of the Second Circuit's decision.

### B. The Second Circuit's Ruling, in *Dicta*, and the D.C. Circuit's Ruling Regarding Section 92's Existence Do Not Create Conflicting Obligations or Rights for Any Entity.

In *IIAA*, these *amici* challenged the Comptroller's ruling permitting the United States National Bank of Oregon to sell insurance from its office located in a town of less than 5,000 to customers located throughout the United States, pursuant to Section 92 of the National Bank Act. *Amici* argued, in *IIAA*, that a national bank's insurance-agency activities must be confined to the "small town" in which it is located. The D.C. Circuit held that

Section 92 no longer exists. Because the Comptroller had cited no other authority for its challenged ruling, the court concluded that the ruling was not in accordance with law. 955 F.2d at 739. That is, the D.C. Circuit held that the Comptroller cannot invoke Section 92 as a source of authority to permit national banks to sell insurance from "small towns."

By contrast, the decision below presents and addresses only the narrow issue of national banks' authority to sell title insurance. The Second Circuit held that, given Section 92, the Comptroller cannot invoke Section 24 (Seventh) as a source of authority to permit national banks to sell title insurance from offices that are not located in small towns.

The two decisions address very different issues. And the two holdings concern entirely different topics. Accordingly, neither the Comptroller nor any other entity is subject to conflicting directives from or accorded different rights by the two courts.

**C. The Issue Is Currently Percolating in the Courts.**

In contrast to the Second Circuit's decision below, the issue of Section 92's continued existence is squarely presented in a case currently pending before the Sixth Circuit. In *Owensboro Nat'l Bank v. Moore*, three national banks with small town offices, invoking Section 92 of the National Bank Act, sought to be licensed to sell insurance in Kentucky. When they were denied license applications, the national banks brought suit against the Kentucky Commissioner of Insurance and Department of Insurance, alleging that Section 92 pre-empts Ky. Rev. Stat. 287.030, which the Commissioner had interpreted as prohibiting any bank—state or national—from being licensed to sell insurance in the Commonwealth. While cross-motions for summary judgment were pending, the D.C. Circuit's decision issued in *IIAA* and the district court asked the parties to brief the issue of Section 92's continued existence. Before the court reached its decision, the Second Circuit

issued its opinion below. The district court eventually concluded that Section 92 exists, expressly adopting the Second Circuit's analysis, and held that Section 92 pre-empts the more restrictive Kentucky law. *Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D.Ky. Aug. 4, 1992).

*Amici*'s Kentucky affiliates, intervenor-defendants in the case, and the state defendants have appealed to the Sixth Circuit.[8] One of the issues on appeal is the existence of Section 92. If the Sixth Circuit rules that Section 92 was repealed, the non-existent statute cannot then pre-empt any state law and the district court's decision will be reversed. Such a holding, in contrast to the Second Circuit's decision below, will *directly* address the powers of national banks pursuant to Section 92, and will be consistent with the D.C. Circuit's holding in *IIAA*.

If, on the other hand, the Sixth Circuit affirms, it will hold that the national banks are entitled to sell insurance pursuant to Section 92. That holding—*unlike* the decision below—will directly conflict with the D.C. Circuit's decision in *IIAA*.

At a minimum, this Court should await the decision of the Sixth Circuit, which may provide clarification and additional assistance to this Court in considering whether there is a need to address the issue of Section 92's continued existence.[9]

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[8] The United States is appearing as an intervenor-plaintiff in the case.

[9] The issue may also arise in a case currently pending before the Fifth Circuit. *Variable Annuity Life Ins. Co. v. Clarke*, No. 92-2010 ("*VALIC*"). *VALIC* concerns the Comptroller's ruling that national banks may sell annuities pursuant to Section 24(Seventh). Appellant has argued that the Fifth Circuit should follow its decision in *Saxon* and the Second Circuit's reasoning here and hold that Section 92 restrains the "incidental" insurance powers of national banks. Before reaching this issue, the Fifth Circuit, like the Second Circuit, may feel compelled to address the question of Section 92's continued existence.

## II. THERE IS NO NEED FOR THIS COURT TO ADDRESS THE ISSUE OF THE INTERACTION OF SECTIONS 92 AND 24 (SEVENTH) OF THE NATIONAL BANK ACT.

Both the Solicitor General and Chase ask this Court to review a portion of the Second Circuit's *reasoning* below—the court's determination that "[S]ection 92 impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general." 968 F.2d at 156.[10] Petitioners claim that the Second Circuit's reasoning conflicts with the decisions of other Circuit Courts; that the reasoning is erroneous; and that it "calls into question a variety of activities performed by national banks." OCC Pet. 9. As Respondents make clear, all of petitioners' claims are wrong. *Amici* fully embrace Respondents' arguments and offer the following additional points.

### A. There Is No Real Conflict With Any Other Court.

The Second Circuit addressed a narrow issue of first impression: whether national banks are empowered to act as agent in the sale of title insurance. Other than the district court in the same case, no other court before or since has addressed this issue. Thus, there can be no direct conflict with the Second Circuit's holding.

Petitioners do not seek review of the Second Circuit's narrowly confined holding. Rather, they seek review of a more amorphous portion of the court's *reasoning* in reaching its decision, contending that it "conflicts" with the reasoning of other courts. But the purported disagreement in reasoning does not warrant this Court's review.

In contending that the Second Circuit reasoning conflicts with the decision of the D.C. Circuit in *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164

[10] The court went on to inquire "whether this prohibition applies to title insurance activities in particular." *Id.*

(1979), *cert. denied*, 449 U.S. 823 (1980), petitioners misrepresent the *Heimann* court's reasoning and ruling.[11] That case concerned bankers' challenge to a Comptroller regulation preventing insiders of national banks from benefitting personally by the regular receipt of credit life insurance income sold to borrowers of such banks. Plaintiffs alleged that the regulation, by approving various methods which enable national banks to sell credit life insurance, violated Section 92. The D.C. Circuit disagreed: "[u]nlike other forms of insurance coverage . . . credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business whether written in a town of over or under 5,000 inhabitants." *Id.* at 1170. That is, the *Heimann* court concluded that credit life insurance does not fall within the ambit of Section 92.[12] This reasoning is not irreconcilable with the Second Circuit's view that, when national banks' insurance-related activity does come within the meaning of Section 92, Section 92 constrains that activity.

As the *Heimann* court stated with regard to *Saxon*, *Heimann* is "simply not in point" here. 613 F.2d at 1170. The case before the Second Circuit had nothing to do with credit life insurance, and the court carefully distinguished the *Heimann* decision. Therefore, petitioners cannot plausibly contend that the *Heimann* case would have come out differently under the Second Circuit's reasoning. Even if there were a clear disagreement between the courts as to the effect of Section 92 on national banks'

[11] This is the only "conflict" the Solicitor General identifies. Chase strains to find other purported "conflicts."

[12] In a footnote the Court stated that "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Id.* at 1170 n.18. But, contrary to petitioners' suggestions, the court did *not* go on to hold—even in *dicta*—that Section 92 does not *implicitly* bar national bank insurance-agency activities outside small towns.

insurance-agency powers pursuant to Section 24 (Seventh) —and there is not—it has no practical impact.

Nor, contrary to Chase's suggestion, is there any conflict with the reasoning of the D.C. Circuit in *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988), in which the court upheld the Comptroller's ruling that national banks may use standby credits to insure municipal bonds pursuant to Section 24 (Seventh). Section 92 is not even mentioned in the court's decision. Rather, after expressly reserving the question whether the product at issue "meets the legal criteria for insurance under various regulatory schemes," *id.* at 280, the court concluded that the sale of this sort of "municipal bond insurance" was "within the business of banking" because it was the functional equivalent of issuance of standby letters of credit.

And in *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991) (appeal pending), the district court upheld the ruling of the Comptroller that fixed and variable annuities constitute "financial investment instruments" and not "insurance" for purposes of the National Bank Act, and that therefore national banks are permitted to sell annuities pursuant to their Section 24 (Seventh) "incidental powers." If, in fact, annuities are not "insurance" (a point with which *amici* disagree), it is not clear that their sale by national banks would be threatened by the Second Circuit's view of Section 92. In any event, the Fifth Circuit has yet to review the case.

### B. Petitioners' Dire Predictions of Threatened National Bank Powers As a Result of the Second Circuit's Decision Are Pure, Unfounded Speculation.

Perhaps because they recognize that the practical impact of the Second Circuit's decision is minimal,[13] peti-

[13] The Court held only that national banks located in towns with populations exceeding 5,000 may not sell title insurance. Neither petitioner suggests that there are large numbers of such banks selling or intending to sell title insurance or that such sales produce substantial profits for the banks. The Second Circuit's decision does not upset well-settled expectations.

tioners contend that the decision "calls into question the ability of national banks to sell a host of other products they have long offered to their customers." OCC Pet. 17. But petitioners offer nothing short of speculation as to how a future, unknown court might or might not rule on an as-yet-unmounted challenge to national bank activity other than that involved in this case. Certainly nothing in the Second Circuit opinion calls into question these other activities; the court did not command that any of the previously-authorized activities be ceased. To the contrary, to the extent the court discussed "insurance-related" activities other than the sale of title insurance, the court was careful not to disagree with the *Heimann* court's conclusion that national banks may sell credit life insurance.

If the Second Circuit decision does engender "uncertainty" in the future about other national bank activities, there will be opportunity for this Court to address the problem *when it arises*. The Court should not expend its limited resources to reach out to address a contingency that may never occur.

### C. None of Petitioners' Arguments That the Second Circuit's Decision Is Wrong Is Persuasive.

Without a real and direct conflict, petitioners resort to asking this Court to sit as a court of error and correct what they view to be the Second Circuit's erroneous decision. Not only have they miscast this Court in that role, *see Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), but their arguments are meritless.

Contrary to petitioners' contention, Congress' use of the introductory phrase "in addition to" is entirely consistent with the Second Circuit's reasoning. The phrase demonstrates that insurance-agency activities were "in addition to" the powers granted by Section 24(Seventh), which cannot, therefore, include insurance-agency activities. In-

deed, petitioners can make their statutory language argument only by separating it from their discussion of the legislative history of Section 92. That history conclusively demonstrates that the 1916 Congress had precisely the understanding echoed by the Second Circuit—that Section 92 was needed to confer insurance-agency powers "in addition to" the powers granted by Section 24(Seventh) because Section 24(Seventh) does not permit the exercise of *any* insurance-agency activities. *See supra* at 6-8 (discussing legislative history). By splitting their discussion of the statutory language and the legislative history, petitioners distort both.[14]

Focussing on a much narrower issue, the Solicitor General tries to perform a verbal sleight-of-hand with his argument that the phrase "agent for any fire, life or other insurance company," demonstrates that Section 92 addresses, at the most, only the sale of "broad forms of insurance." OCC Pet. 13-14. The Solicitor General appears to equate the term "other" with "broad"—a word that appears nowhere in the statute or the legislative history, and whose meaning he does not define in this context.[15] But there is no linguistic or logical relation

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[14] The above discussion exposes the fallacy of petitioners' argument that the Second Circuit "misused" the principal of statutory construction, *expressio unius est exclusio alterius*. The Solicitor General notes that the principle "can never override clear and contrary evidence of Congressional intent." *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940). But the only expression of congressional intent—the legislative history—is entirely consistent with the Second Circuit's ruling. And the "in addition to" introductory language, at a minimum, does not demonstrate that the Second Circuit was *clearly* wrong.

[15] The Solicitor General seems to draw a distinction between "broad" forms of insurance and "more specialized forms of insurance." OCC Pet. 13. But—other than asserting that title insurance falls into the later category—he makes no attempt to give a reasoned explanation of this distinction or explain how a court might go about discerning the difference in a given case.

between the two terms. "Other," as used in Section 92, means simply any form of insurance company *other* than one that provides fire or life insurance. A title insurance company clearly meets that definition.

Neither Chase nor the Solicitor General presents a coherent interpretation of the National Bank Act. The Solicitor General contends that "[n]o party has argued that the power of national banks to engage in insurance agency activities incidental to the business of banking under Section 24(Seventh) authorizes banks to engage in an unlimited insurance agency business." OCC Pet. at 15. But he offers no clear vision of precisely what insurance-related activities *are* authorized by Section 24(Seventh) and how those powers could be reconciled with Section 92's limited authorization. *See also supra* n.15. Chase's attempt to distinguish large town banks' inability to engage in "the full range of general insurance agency activities authorized by section 92" from their purported ability to engage in "specific insurance agency activities that are incidental to banking under section 24(Seventh)" fairs no better. Chase Pet. 23. Chase, like the Solicitor General, is reaching for a result, not presenting a consistent legal theory.

## III. THE ISSUES ON WHICH PETITIONERS SEEK REVIEW ARE NOT CLEANLY PRESENTED.

There are many issues buried in this case, and petitioners disingenuously suggest that this Court can meaningfully address the questions they present for review. The *first* issue is whether Section 92 was repealed in 1918; this was decided by the D.C. Circuit, and ruled on in *dicta* by the Second Circuit, but is currently before both the Fifth and Sixth Circuits. The *second* issue is whether Section 92, if in existence, constitutes a limitation on Section 24(Seventh); this issue was decided by the Second Circuit, but is currently pending before the

Fifth Circuit in *VALIC*, where the rule was first enunciated in *Saxon*, and the court may or may not adhere to the *Saxon* reasoning. The *third* issue is whether Section 92, even if repealed, constitutes a limitation on Section 24 (Seventh) as a result of its initial passage; the Second Circuit did not reach this issue, which is presented to the Fifth Circuit in *VALIC*, but would have to do so if this Court were to grant review and reverse the Second Circuit's conclusion that Section 92 still exists. *See supra* at 5-9. The *fourth* issue is whether, standing alone, Section 24(Seventh) can be interpreted to permit any insurance activities as "incidental and necessary" to banking and, if so, what activities, including the sale of title insurance, does it permit; this issue was presented to the Second Circuit below, but it concluded that it need not reach the question. *ALTA*, 968 F.2d at 157.

As noted above, even if this Court were to grant review and conclude that Section 92 had been repealed, Section 92's enactment must nonetheless be construed as limiting the authority of Section 24(Seventh)—a conclusion which does not alter the result below. Even if this Court were to conclude that Section 92 poses no such limitation, whether in existence or not, that conclusion still would not mean that the decision below must be reversed. Rather, the court below would go on to determine whether "the general grant of power contained in Section 24(Seventh) [is] sufficiently broad to encompass the title insurance agency business." *ALTA*, 968 F.2d at 157. In short, even if this Court were to grant the petitions and rule entirely in petitioners' favor, that decision would not resolve this case. *See Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

## IV. THE CONTROVERSY REGARDING THE INSURANCE-RELATED POWERS OF NATIONAL BANKS SHOULD BE LEFT TO CONGRESS.

In the end, both Chase and the Comptroller disagree, *as a matter of policy*, with the restrictions placed on national banks' insurance-related powers by Congress as interpreted by the Second Circuit's decision. Chase's petition demonstrates precisely why this controversy should be left to Congress. Chase argues that the result below is unfair because national banks would be left at a competitive disadvantage vis-a-vis state financial institutions. Chase Pet. 25. Chase contends that it should be granted existence of the dual banking system.[16] Similarly, Chase argues that "[t]he increasing competition posed by nonbank financial institutions to the banking industry dictates that national banks not be judicially restrained from exercising the full range of their statutory powers." Chase Pet. 25. Chase contends that it should be granted the power to sell title insurance in order to enable it "to compete profitably in today's extremely competitive financial services marketplace." *Id.* 26.

Arguments about competitive advantages for and profitability of national banks should be presented to Congress, not this Court. Although the Comptroller and Chase might wish that national banks had been given a broader grant of authority, their remedy is to seek congressional action, rather than asking this Court to make policy. *See Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364 (1986) (holding that it is for Congress, not the agency or courts, to remedy any perceived fault with federal statute).

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[16] "Ours is a dual banking system in the sense that state and national banks have existed side by side and in direct competition with each other for many years." *American Fidelity Bank & Trust Co. v. Heimann*, 683 F.2d 999, 1000 (6th Cir. 1982).

## CONCLUSION

*Amici* agree with the Solicitor General that the petitions in this case and in *IIAA* should be treated similarly: The petitions for writ of certiorari should be denied in both cases.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
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No. 92-482

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari To the United States Court of Appeals For the Second Circuit**

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## BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL.,* IN SUPPORT OF THE PETITIONER

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## QUESTION PRESENTED

Whether Section 92 of the National Bank Act, granting insurance agency powers to national banks in small towns that are "in addition to the powers now vested by law in national banking associations," constitutes an implied limitation upon the incidental powers of national banks, granted elsewhere in the statute, where such banks are located in larger towns.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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**No.92-482**

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THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari**
**To the United States Court of Appeals**
**For the Second Circuit**

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## BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONER

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The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

### INTEREST OF THE AMICI CURIAE

The American Bankers Association, Association of Bank Holding Companies, Association of Banks in In-

surance and Consumer Bankers Association are all national trade associations of the commercial banking industry. A large majority of commercial banks in the United States, their employees or the bank holding companies that own them are members of one or more of the associations. The Minnesota, Missouri and Wisconsin Bankers Associations are the principal trade associations for the banking industry within their respective states. All of the associations represent the interests of both national banks and state-chartered banks in the legislatures, regulatory agencies and in the courts on issues that are of widespread importance to the industry. This is such a case for the reasons set forth below.

## REASONS FOR GRANTING THE WRIT

### I. The Conflicts Among the Circuits

There are two conflicts among the circuits presented in this case. The first is whether or not Section 92 of the National Bank Act continues to exist; the second is over how to construe Section 92 assuming it does exist. For purposes of *this* case, the second is the more important of the two.

Section 92 of the National Bank Act was enacted in 1916. It was designed to grant to those national banks located and doing business in small towns the power to engage in the general insurance agency business. The opening clause of Section 92 provided that this power was to be "in addition to the powers now vested by law in national banking associations."[1] Among the powers then and now vested in national banking associations was the power to exercise "all

[1] Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (1916).

such incidental powers as shall be necessary to carry on the business of banking."[2] The Comptroller of the Currency is charged with the interpretation and enforcement of these and other provisions of the National Bank Act. *Clarke v. Securities Industry Association*, 479 U.S. 388, 403-04 (1987).

In this case, Chase Manhattan, located and doing business in New York City, sought and received the approval of the Comptroller to engage in the business of selling title insurance as agent, as an exercise of its "incidental powers." The District Court upheld the Comptroller's action. *American Land Title Association v. Clarke*, 772 F. Supp. 1353 (S.D.N.Y. 1991).

On appeal, the Second Circuit reversed. In doing so, each of the court's two key holdings place the Circuit's decision in direct and irreconcilable conflict with decisions of other U.S. Courts of Appeals.

The most obvious conflict is with a District of Columbia Circuit opinion handed down four months earlier in *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), and it concerns the very existence of Section 92 of the National Bank Act. Because of two arguably misplaced quotation marks in the statute enacting Section 92, subsequent legislation, enacted only two years later and on an entirely unrelated subject, is said to have repealed Section 92. The District of Columbia Circuit concluded that Congress did what it did, and that "section 92 has ceased to exist." *Id.* at 739. The Second Circuit, in the case below, explicitly disagreed with the District of Columbia Circuit, holding that whatever hap-

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[2] 12 U.S.C. § 24 (Seventh).

pened in 1918 did *not* effect a repeal of Section 92. *American Land Title Association v. Clarke*, 968 F.2d 150, 152 (2d Cir. 1992).

Obviously, this conclusion by the Second Circuit is absolutely critical to its ultimate holding. If Section 92 does not exist, then there is no basis upon which the court could find a "limitation" upon the incidental powers of national banks. It would have to have reached the question (which it declined to reach) whether title insurance agency activities fit within the incidental powers clause of the National Bank Act, and the decision cannot stand.

The respondent title associations, the Comptroller of the Currency, and your amici *all* take the position that the Second Circuit's decision upholding the continued existence of Section 92 is correct. Chase Manhattan does not take a contrary position. (*See Chase Manhattan Bank v. American Land Title Association*, No. 92-482, Pet. for Cert. at 12-13). The conflict between the Second and the District of Columbia Circuits is before the Court on petitions for writ of certiorari to review the District of Columbia Circuit opinion in the *Independent Insurance Agents* case. *Steinbrink v. Independent Insurance Agents of America*, No. 92-507; *U.S. National Bank v. Independent Insurance Agents of America*, No. 92-484. The Court can and should resolve the conflict over the existence of the statute in the context of those cases.

But doing so will not resolve the *second* conflict among the circuits that is created by the decision below in this case. If Section 92 does exist, is it an implied limitation upon the insurance powers of national banks in large towns or is it an independent grant of insurance powers to national banks in small

towns? That conflict is separate and distinct, and survives the outcome of the dispute over the existence of Section 92.

The Petitions for Writ of Certiorari in this and its companion case correctly point out that the decision of the Second Circuit here and of the Fifth Circuit in *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968) both construe Section 92 of the National Bank Act as a limitation upon the rights of national banks located in larger jurisdictions to engage in the insurance business, whether or not the particular insurance business in question might be considered "incidental" to banking. On the other hand, the District of Columbia Circuit, in *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), and the Eighth Circuit, in *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 736 F.2d 468 (8th Cir. 1984), both have clearly rejected the idea that there is that kind of negative inference to be drawn from Section 92.

While your amici agree with the Petitioners on this point, we respectfully suggest that this particular conflict between the circuits is even deeper and perhaps more subtle than it appears at first blush. The conflict has to do with the order in which the respective courts analyze the applicable or arguably applicable statutes in cases testing the powers of banks under the National Bank Act, and the priorities that are assigned to different sections of the law.

Here, the Second Circuit looked *first* at Section 92 of the Act. Having done so, it opted for an easy answer: Title insurance is insurance; insurance can

only be offered by those national banks located in small towns; Chase Manhattan is located in a large town, so it cannot offer title insurance; all other considerations are irrelevant. Had the Second Circuit instead looked first to Section 24 (Seventh) of the National Bank Act, it would have to have analyzed the question whether title insurance agency sales fit within the business of banking or, more precisely, whether the Comptroller of the Currency was within his rights in so concluding. If the court then had decided that title insurance *was* part of the business of banking, it could have dismissed sections of the law governing *non*banking activities as irrelevant—including Section 92. Other courts—even including another panel of the Second Circuit—have done precisely that, and the Second Circuit's failure to do so in this case creates a conflict in the framework for analysis of this particular issue and related ones.

In *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 111 S.Ct. 442 (1990), the bank proposed to offer "debt cancellation contracts" to its customers, alleging (with the agreement of the Comptroller of the Currency and the Comptroller's support as amicus curiae before the Eighth Circuit) that such contracts were within the incidental powers of national banks. The contracts provided that, for a fee, the bank would cancel a borrower's then outstanding indebtedness upon the borrower's death or disability. The Arkansas Insurance Department directed the bank to cease and desist, claiming that the contracts were the functional equivalent of credit life insurance policies and, as such were subject to regulation by the Department, could not be sold without an insurance license, and that

insurance licenses could not be issued to banks in Arkansas. The bank argued that, as a national bank, its powers were governed by preemptive federal law; the Department countered that the federal McCarran-Ferguson Act left regulation of the insurance business exclusively to the states.

The Eighth Circuit looked *first* to Section 24 (Seventh) of the National Bank Act to determine the powers of the national bank in question. It concluded that debt cancellation contracts fit within the incidental powers of banks. The court *then* turned to the statute governing *non*banking activities to determine its applicability to the case at hand. It did not deny that debt cancellation contracts might be "insurance" for state law purposes, but concluded that that was an irrelevant consideration: "*Because* debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they *do not constitute* 'the business of insurance' under the McCarran-Ferguson Act." *Id.*, 907 F.2d at 779.

Had the Eighth Circuit looked first at the statute governing nonbanking activities, as the Second Circuit did in this case, it could well have determined that debt cancellation contracts were insurance and left to the regulation of the Insurance Department, never reaching the "incidental powers" issue. That court examined the arguably applicable statutes in the reverse order from the Second Circuit's, the two decisions therefore being in conflict with one another.

In *Securities Industry Association v. Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), Security Pacific National Bank proposed to pool its mortgage loans and sell participations in that

pool to investors. The Comptroller of the Currency approved, and a trade association of the securities industry sued, claiming that the bank would be engaged in underwriting and selling securities in violation of the Glass-Steagall Act. The Second Circuit upheld the Comptroller's approval. It looked *first* at Section 24 (Seventh) of the National Bank Act, and found that that Section granted explicit powers to national banks to negotiate promissory notes or other evidences of debt, and that is precisely what Security Pacific was doing. The Court *then* reached the provisions of law governing the securities business, and found them inapplicable *because* it had already determined the activities to be authorized by the statute governing the banking business:

> Activity that falls within the "business of banking" is not subject to the restrictions the latter part of section 16 places on a bank's "business of dealing in securities and stock." Thus, the issues concerning the definitions of "securities" and "underwriting" only become relevant if the activity constitutes "the business of dealing in securities and stock." If the activity constitutes "the business of banking," then the Glass-Steagall Act prohibitions SIA claims are violated here do not apply.

*Id.*, 885 F.2d at 1048.

In this case, where the court looked first to the statute governing nonbanking activities to determine the powers of a bank, it has acted in conflict with a different panel of the same court.

Obviously, this is not to say that the grant of power to national banks to engage in the business of banking

found in Section 24 (Seventh) can overcome explicit statutory prohibitions against banks engaging in a particular business or in a particular way. But there is no such prohibition here. Even if the Second Circuit is right in holding that the law gives a power in one section of the law and takes it away in another by negative inference, there must still be some principled way to choose which of those two sections actually governs the outcome of a particular case. Here, the Second Circuit claims to follow the rule of statutory construction that the statute addressing the matter under consideration in specific terms controls over one that does so in a general manner. 968 F.2d at 157 (citing *Crawford Fitting Company v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987)). That is an entirely fitting and proper rule of statutory construction where it is applicable. It is not applicable here. There is no reason to think that the term "act as the agent for any fire, life, or other insurance company" found in Section 92 is any more (or less) "specific" than is the term "carry on the business of banking" found in Section 24 (Seventh), nor does the Second Circuit opinion state why that court believes the former to be more specific than the latter. It merely premises its decision upon the unsupported assumption that it is so.

The more appropriate rule of statutory construction to follow—the one that *is* applicable in this case—is the rule that requires courts to give effect to the plain language of the statute. *See, e.g. Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-75 (1986). Here, the court believed it was faced with the prospect of choosing between Section 24 (Seventh) and Section

92. One of those sections directs the answer by its own terms. The powers that are granted by Section 92 are "in addition to the powers now vested by law in national banking associations." With plain statutory language like that, it would seem incumbent upon the courts to decide—first—what those "other powers" might be. That would require looking—first—at Section 24 (Seventh). The fact that the Second Circuit here performed the statutory analysis upside down places it not only in conflict with the decisions of other circuits, but also in conflict with this Court's "plain language" rule of statutory construction.

**II. The Important Question of Federal Law**

The Petitions for Writ of Certiorari in this case and its companion case correctly point out the impact that the Second Circuit's decision will have upon the operations of a great many national banks if the decision stands and, particularly, if it is followed as precedent elsewhere.

Literally thousands of national banks act as agent in the sale of credit-related insurance—credit life and credit disability—in the exercise of their incidental powers, with the approval of the Comptroller of the Currency (12 C.F.R. § 2.6 (1991)) and the courts, without regard for the size of the jurisdiction in which they are located and doing business. *Independent Bankers Association of America v. Heimann*, *supra*, 613 F.2d 1164.

A substantial and growing number of national banks sell both fixed and variable rate annuities as agents, over the objection by representatives of the insurance industry that annuities are "insurance" products. Such sales are likewise approved by the Comptroller of the

Currency as an exercise of the incidental powers of national banks, again without regard to the size of the town in which the bank operates (Comptroller Interp. Letter No. 499 [1989-90 Transfer Binder] Federal Banking Law Rep. (CCH) ¶ 83,090 (Feb. 12, 1990); Comptroller Interp. Letter No. 331 [1985-87 Transfer Binder] Federal Banking Law Rep. (CCH) ¶85,501 (April 4, 1985), and approved by the U.S. District Court in the only challenge to the Comptroller's approvals. *Variable Annuity Life Insurance Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.).

The Comptroller of the Currency has approved the sale of municipal bond insurance by national banks, including a national bank in New York City, as an exercise of incidental powers of the banks, and the courts have upheld that action. *American Insurance Association v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

The Comptroller approved the sale of debt cancellation contracts by national banks as an incidental power. The Eighth Circuit upheld that action in *First National Bank of Eastern Arkansas, supra*, 907 F.2d 775, even though the bank in question is located in Forrest City, Arkansas, population 13,364.[3]

The Second Circuit's decision is incompatible with all of the above regulatory action and court decisions and, if nothing else, casts doubt upon the validity of considerable portions of the activities of national banks of long standing, undertaken in reliance upon earlier regulatory and judicial approval.

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[3] *McFadden American Bank Directory*, Spring, 1992 (Arkansas) page 23.

But national banks are not the only banks with an important interest in the outcome of this matter. State chartered banks are affected by it as well. In as many as 37 states, there are so-called "wild card" or "parity" statutes.[4] With quite a few variations, these statutes generally provide that state chartered banks may have and exercise any powers that may be exercised by national banks located in the same state, notwithstanding other provisions of state law. In many jurisdictions, the "wild card" statute is the only source of authority for state-chartered banks to engage in one or more of the "incidental" functions described above for national banks. Consequently, if the Second Circuit decision remains unreviewed and unreversed, the loss of "incidental" powers by national banks shall inevitably result in the loss of comparable powers by a great many state chartered banks as well. Like their national brethren, state-chartered banks have invested in the development of "incidental" business and established business relationships with customers over a long period of time in justified reliance upon favorable regulatory and judicial action. The Second Circuit's decision threatens to disrupt much of settled practice, to the great detriment of both national and state chartered banks and their customers. It therefore presents a question of federal law of sufficient importance to warrant review by this Court, even independent of the two conflicts among the circuits that are created by the Second Circuit's decision.

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[4] *See* Appendix to this brief for complete listing.

## CONCLUSION

For all of the reasons stated herein and in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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November 12, 1992

# APPENDIX

## APENDIX

### Wild Card/Parity Statutes

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| Alaska | Sec. 06.01.020 |
| Arizona | Sec. 6-184(2) |
| Arkansas | Sec. 23-32-701(16) |
| Colorado | Sec. 11-2-103 |
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| Hawaii | Sec. 403-47.1 |
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| Louisiana | Tit. 6, §242(A)(15), Revised Stat. |
| Maine | Tit. 9B, §416 |
| Maryland | Sec. 5-504 of Fin. Inst. Art. |
| Minnesota | Sec. 48.15 (Subd. 2) |
| Mississippi | Sec. 81-5-1(10) |
| Missouri | Sec. 362.105.3 |
| Montana | Sec. 32-1-362 |
| Nevada | Sec. 662.015(1)(f) |
| New Hampshire | Ch. 394-A |
| New Jersey | Sec. 17:9A-24a and 17:9A-25(12) |
| New Mexico | Sec. 58-1-54 |
| North Dakota | Sec. 6-03-38 |
| Ohio | Sec. 1125.23 |
| Oklahoma | T.6, §203 |
| Oregon | Sec. 707.340 |
| South Carolina | Sec. 34-1-110 |
| South Dakota | Sec. 51A-2-14 |
| Tennessee | Sec. 45-2-601 |
| Texas | Sec. 342-113(a)(4) of Civil Statutes |
| Utah | Sec. 7-1-301(3) |
| Vermont | T.8, §1163 |

| | |
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| Virginia | Sec. 6.1-5.1 |
| Washington | Sec. 30.04.215 |
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v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## REPLY BRIEF FOR PETITIONER THE CHASE MANHATTAN BANK, N.A.

---

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IN THE

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OCTOBER TERM, 1992

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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## REPLY BRIEF FOR PETITIONER THE CHASE MANHATTAN BANK, N.A.

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The Respondents' Brief in Opposition in fact confirms that *certiorari* should be granted.

1. *All parties acknowledge a direct and irreconcilable conflict.* Petitioner, The Chase Manhattan Bank, N.A. ("Chase"),* the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency (collectively, "OCC"),[1] and Respondents American Land Title Asso-

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* Chase's parent and nonwholly-owned subsidiaries are listed on page ii of the petition.

[1] The OCC's petition seeking review of the Second Circuit decision is captioned *Steinbrink* v. *ALTA*, No. 92-645.

ciation and New York Land Title Association (collectively, "ALTA"), all agree that the decision below and the recent decision of the District of Columbia Circuit in *Independent Ins. Agents of Am.* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 & 92-507), are in direct conflict concerning whether Congress in 1918 repealed a provision of a 1916 Act of Congress formerly codified at 12 U.S.C. § 92. The critical significance of this admitted irreconcilable conflict is attested to by the fact that Petitioner, the Solicitor General and Respondents also concur that resolution of this conflict in favor of the position of the D.C. Circuit would compel this Court's vacation of the Second Circuit's judgment in the case below. Chase Pet. 9 n.14; OCC Pet. 18-19 n.13; ALTA Opp. 9 n.10. Indeed, notwithstanding being clad in the bright orange jacket of a brief in opposition, ALTA's "Opposition" expressly *supports* "grant[ing] the petitions here" under these circumstances. Opp. 9 n.10. ALTA's apparent ambivalence concerning the worthiness of this case for review also is reflected in a recent public statement by its executive vice-president: "In a way, I'm glad they've filed the cert petition. Hopefully, we'll have a definitive ruling." BNA Banking Report, Sept. 28, 1992 at 437.

2. *The decision below presents a double conflict.* If the Court affirms the Second Circuit's view that Section 92 remains law, the petitions of Chase and the OCC present a second issue of equally substantial importance over which the circuits are in conflict warranting this Court's review. The decision of the Second Circuit, flatly in conflict with the decision of the District of Columbia Circuit in *Independent Bankers Association* v. *Heimann*,[2] lays down a *per se* rule that every insurance agency activity by a national bank not expressly permitted by Section 92 is prohibited. Relying upon the 1968 decision

[2] 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

of the Fifth Circuit in *Saxon* v. *Georgia Association of Independent Insurance Agents*,[3] which ruled that "'national banks have *no power* to act as insurance agents in cities of *over* 5,000 population,'"[4] the Second Circuit held that the language of Section 92:

> makes inescapable the conclusion that Congress intended this provision to apply to "*any . . . insurance company*," and a title insurance company surely is an insurance company. *Id.* Thus, section 92 impliedly bars national banks from engaging in the title insurance agency business.[5] (Emphasis added.)

Having held that Section 92 imposes a *per se* ban on all national bank insurance agency activities outside of small towns, the Second Circuit *refused* even to consider whether, because of its unique relationship to the mortgage lending business of national banks, title insurance agency business is authorized by 12 U.S.C. § 24 (Seventh) as incidental to the business of banking. Chase Pet. App. 15a-16a.

In sharp contrast, the District of Columbia Circuit held in *Heimann* that Section 92 does not restrict a national bank's authority to sell credit life insurance to towns of fewer than 5,000 persons because the sale of such insurance is incidental to banking and thus authorized by Section 24 (Seventh). 613 F.2d 1170.

ALTA attempts to minimize what it admits to be the "apparent conflict" between *Heimann* and the Second Circuit's decision below by listing four pages of supposedly "unique factors" that ALTA believes make credit life insurance more closely incidental to banking than is title insurance. Br. Opp. 12-16. As the OCC states in its petition, however, under the Second Circuit's "interpretation of Section 92 [this] asserted distinction is irrelevant, since

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[3] 899 F.2d 1010 (5th Cir. 1968).

[4] Chase Pet. App. 13a (emphasis added).

[5] Chase Pet. App. 14a.

whatever their differences, both title insurance and credit life insurance are forms of insurance." OCC Pet. 11.

The principal flaw in ALTA's argument is that ALTA overlooks the basis on which the Second Circuit decided the case. The Second Circuit, like the Fifth Circuit in *Saxon*, "did not rest its decision on the nature of the insurance activities engaged in by the bank" and, in fact, declined to undertake the type of analysis suggested by ALTA.[6] Chase Pet. App. 14a-16a. The court decided the case on the basis that Section 92 implicitly bars national banks in places of more than 5,000 inhabitants from engaging in *any* insurance agency activities, whether or not they are incidental to the business of banking.

The ruling of the District of Columbia Circuit in *Heimann* authorizing national banks to act as agent in the sale of credit life insurance simply cannot be reconciled with the *per se* bar adopted by the decision below. As the District of Columbia Circuit held in *Heimann*, and as the District Court and the Comptroller held below in this case, if Section 24 (Seventh) authorizes a particular insurance agency activity as incidental to banking, Section 92 poses no geographic barriers to the con-

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[6] ALTA's analysis of these factors would be relevant, if at all, to determining whether Section 24 (Seventh) authorizes the sale of title insurance as an incident to the business of banking, rather than to determining whether the purported *per se* rule of Section 92 prohibits this activity. In fact, this very type of analysis was conducted by the OCC in authorizing Chase's subsidiaries to sell title insurance. The OCC's determination is entitled to deference from the courts under *Chevron* and its progeny. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984); *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987). Based on its erroneous interpretation of Section 92, however, the Second Circuit never "decide[d] whether the title insurance agency business is 'incidental' to banking within the meaning of section 24 (Seventh)." Chase Pet. App. 16a.

duct of that lawful activity.[7] The conflict among the circuits concerning the relationship of Section 92 (assuming its existence) to the incidental powers of national banks under Section 24 (Seventh) could not be clearer.

3. *The 1915 and 1916 Interpretations.* ALTA acknowledges that the plain language of Section 92 states that its grant of power is "in addition to" those granted elsewhere to national banks. Br. Opp. 19. ALTA, however, attempts to displace this plain language by reference to two agency documents, published during the first Wilson Administration, stating that Section 24 (Seventh) did not grant national banks the power to act as general insurance agents in the sale of "fire, cyclone, liability, or other types of insurance." Br. Opp. 2-3, 19, 1a-8a.

The most glaring defects in ALTA's statutory analysis are: (1) that those administrative interpretations are of Section 24 (Seventh), not Section 92; (2) those administrative interpretations relate to general insurance agency activities and do not purport to address whether more specialized forms of insurance agency activities, such as title insurance or credit life insurance, might be incidental to banking; and (3) the Comptroller has, over the course of the 75-year period following the issuance of the agency documents on which Respondents rely, addressed the specific issue whether the sale of various types of specialized insurance is incidental to the business of banking and authorized under Section 24 (Seventh) and has determined in a number of cases that they are.[8]

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[7] Having determined nine years earlier in *Heimann* that Section 92 is irrelevant to whether a national bank can sell specialized forms of insurance as being incidental to banking pursuant to Section 24 (Seventh), the District of Columbia Circuit held in *American Insurance Association* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988), that national banks are authorized to sell municipal bond insurance as an incident to the business of banking.

[8] Finally, ALTA attempts to beef up its unsupportable statutory analysis by referring to two sections of the National Bank Act that this Court has interpreted as impliedly limiting the powers of

4. *The decision below sharply curtails the fundamental statutory authority of all national banks.* The Second Circuit's *per se* rule raises issues of critical importance to the national banking system because it applies to any and all types of bank insurance agency activities. In the Second Circuit, ALTA argued that Section 92 "impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants." Chase Pet. App. 11a. Having persuaded the Second Circuit that there is an implicit bar in Section 92 applicable to all forms of insurance, ALTA now attempts to narrow the broad scope of that decision by arguing that it "relates only" to the sale of title insurance by national banks and thus does not raise issues of importance meriting this Court's review. Br. Opp. at 17. No amount of Respondent's post hoc linguistic contortions, however, can hide the fact that the Second Circuit has adopted a *per se* rule applicable to the sale of any and all forms of insurance by national banks. As noted above, the Second Circuit did not predicate its *per se* rule "on the nature of the insurance activities engaged in by the bank." Chase Pet. App. 14a. Instead, like the *Saxon* court on which it relied, the Second Circuit viewed Section 92 as an expression of "Congress' intent that 'national banks have *no power* to act as insurance agents in cities of *over* 5,000 population.'" *Id.* (Emphasis added.)

As explained in the petitions of Chase and the OCC, national banks long have engaged in a variety of specialized insurance agency activities held by the Comptroller

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national banks. Br. Opp. 20 n.23. Unlike Section 92, neither of those two sections—12 U.S.C. §§ 81, 90—contains language stating that its grant of powers is "in addition to" other powers granted by the National Bank Act. Had those statutes contained such language, the result of the two Depression-era cases cited by ALTA likely would have been different.

As its plain language states, Section 92 is a grant of additional powers, not an implied limit on the incidental powers granted to national banks by Section 24 (Seventh).

to be "incidental to banking" and authorized by Section 24 (Seventh). Chase Pet. 14-18. OCC Pet. 17-18. All of these Section 24 (Seventh) insurance agency activities would be prohibited under the Second Circuit's *per se* rule. *Id.* Moreover, as noted by the American Bankers Association in its *amicus* brief, "borrowing" statutes in 38 states upon which state banks rely for their incidental powers broaden the direct impact of the issue beyond national banks to reach banks in those 38 states. ABA Br. at 12.

## CONCLUSION

For the reasons stated herein and in our petition, the petition for *certiorari* should be granted.

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No. 92-482

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## SUPPLEMENTAL BRIEF OF PETITIONER THE CHASE MANHATTAN BANK, N.A.

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|---|---|
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## SUPPLEMENTAL BRIEF OF PETITIONER THE CHASE MANHATTAN BANK, N.A.

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Petitioner The Chase Manhattan Bank, N.A. ("Chase")[1] submits this Supplemental Brief to advise the Court regarding appropriate disposition of the petition in this case in light of the decision earlier this week in the related case of *United States National Bank of Oregon et al.* v. *Independent Insurance Agents of America, Inc. et al.*, Nos. 92-484 & 92-507. The decision in *United States National Bank*, far from disposing of the critical issue presented in this case (on which the circuits are divided), makes it all the more urgent for this Court to resolve.

The petitions of Chase, No. 92-482, and of the Office of the Comptroller of the Currency ("OCC"), No. 92-645, present a conflict among the courts of appeals as to the meaning of a provision of the National Bank Act that formerly was codified at 12 U.S.C. § 92 ("Section 92"). On December 14, 1992, this Court apparently delayed action on our petition in order to decide in *United States National Bank of Oregon et al.* v. *Independent Insurance Agents of America, Inc. et al.*, Nos. 92-484 & 92-507, *cert. granted* that date, the predicate question whether Section 92 was repealed in 1918. On June 7, 1993, this Court held in that case that Section 92 continues to exist.

Now that the Court has determined that Section 92 exists, the way is clear to resolve the issue presented in the present case—whether Section 92 is a grant of insurance agency powers "in addition to" those powers incidental to banking transactions granted by Section 24 (Seventh) of Title 12 (as the D.C. Circuit has held and the plain language of Section 92 indicates), or instead

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[1] Chase's parent and non-wholly owned subsidiary corporations are listed at page ii of the petition.

impliedly bars the exercise of the powers granted by Section 24(Seventh) (as the Second Circuit held below). Consistent with the position of the OCC as affirmed by the D.C. Circuit, this Court's decision in *United States National Bank* characterizes Section 92 as "*granting* powers of insurance agency to some national banks." *Slip op.* 22 (emphasis added). As the Solicitor General stated in the OCC's petition as to this issue, review of the Second Circuit's decision "is warranted because of the conflict, because the decision below is wrong, and because the decision below calls into question a variety of activities performed by national banks." OCC Pet. 9.

1. *The issue is of tremendous commercial importance to the banking industry.* While the question resolved by the Court in *United States National Bank of Oregon* as to the continued existence of Section 92 is perhaps of greater abstract intellectual interest, the conflict presented by the present case regarding the meaning of Section 92 is of far greater practical significance. The general insurance agency powers that Section 92 grants to national banks located in small towns is of little importance to the vast majority of the citizenry. Of far greater commercial importance is whether Section 92 impliedly limits the incidental insurance agency powers granted by Section 24(Seventh).

Over the past four decades, the OCC has ruled that certain specific forms of insurance agency sales activities, such as sales of title insurance, credit life insurance, municipal bond insurance, and annuities, are incidental to banking and therefore authorized for all national banks under Section 24(Seventh). Pursuant to these determinations, national banks for decades have engaged in various insurance activities that are incidental to the business to banking. Chase Pet. 14-18. OCC Pet. 17-18. The nationwide injunction sought by ALTA, which would bar the OCC from approving title insurance agency activities by any national bank, would obviously have a signifi-

cant impact upon the current and future operations of all national banks nationwide.[2]

2. *The Courts of Appeals are divided on whether Section 92 imposes a ban on all insurance agency sales by banks located in towns of more than 5,000 persons.* The decision of the Second Circuit below lays down a *per se* rule that every insurance agency activity by a national bank not expressly permitted by Section 92 is prohibited. Relying upon the 1968 decision of the Fifth Circuit in *Saxon* v. *Georgia Association of Independent Insurance Agents*,[3] which ruled that " 'national banks have *no power* to act as insurance agents in cities of over 5,000 population,' "[4] the Second Circuit held that the language of Section 92:

> makes inescapable the conclusion that Congress intended this provision to apply to "*any . . . insurance company*," and a title insurance company surely is an insurance company. Thus, Section 92 impliedly bars national banks from engaging in the title insurance agency business.[5] (Emphasis added.)

The Second Circuit *refused* even to consider whether, because of its particularly close relationship to the mortgage lending business of national banks, title insurance agency business is authorized by 12 U.S.C. § 24(Seventh) as incidental to the business of banking. Chase Pet. App. 15a-16a.

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[2] As noted by the American Bankers Association in its *amicus* brief, these provisions of the National Bank Act have an impact on the powers of state-chartered banks as well, as a result of "borrowing" statutes in 38 states upon which state banks rely for their powers. ABA Br. at 12.

[3] 399 F.2d 1010 (5th Cir. 1968).

[4] Chase Pet. App. 13a (emphasis added).

[5] Chase Pet. App. 14a.

In contrast, the District of Columbia Circuit held in *Independent Bankers Association* v. *Heimann*,[6] that Section 92 does not restrict a national bank's authority to sell credit life insurance in towns and cities of more than 5,000 persons. It held that the sale of that type of insurance is incidental to banking and thus authorized by Section 24(Seventh), and that the provisions of Section 92 authorizing the sale of *any* type of insurance, incidental to banking or not, in towns of less than 5,000 people, did not restrict the incidental insurance agency powers granted to national banks generally by Section 24(Seventh). 613 F.2d 1170.

The ruling of the Second Circuit below, adopting a *per se* bar on any national bank insurance agency activities outside of small towns, simply cannot be reconciled with the decision of the District of Columbia Circuit in *Heimann* authorizing national banks to act as agent in the sale of credit life insurance at any location. As the Solicitor General stated, "if Section 92 impliedly bars national banks from selling insurance, it bars them from selling credit life insurance. . . . In fact, the Second Circuit's analysis is entirely incompatible with the D.C. Circuit's holding in *Heimann*." OCC Reply Br. 5. As stated by the Solicitor General, "the conflict between the Second and the D.C. Circuits over the effect of Section 92 is of sufficient importance to warrant resolution by this Court." OCC Pet. 16.

3. *The conflict is overdue for decision.* The OCC's interpretation that Section 92 is a *grant* of additional powers rather than a limit on the incidental powers of Section 24(Seventh) dates back some thirty years or more. The Fifth Circuit decided the *Saxon* case against the OCC on this issue 25 years ago. The D.C. Circuit decided this same issue in favor of the OCC in *Heimann*, and contrary to the Fifth Circuit, fourteen years ago.

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[6] 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

Subsequent decisions by the Eighth Circuit,[7] the D.C. Circuit,[8] the California State Court of Appeal,[9] and the decision of the Second Circuit below have divided between the Fifth Circuit and D.C. Circuit approaches. Twenty-five years and six appellate decisions by five separate courts is percolation enough for any question. It would have been enough even had the issue as to the continued existence of Section 92 never been raised.[10] It would be appropriate at this date for the Court to grant the petitions for *certiorari* and resolve now the question whether Section 92 is a grant of powers in addition to those established by Section 24(Seventh) or is instead a limitation upon the incidental powers granted by Section 24(Seventh).

4. *The Second Circuit decision is internally inconsistent.* In addition to being in conflict with the decisions of other courts, the Second Circuit decision is internally inconsistent. The Second Circuit refused to reach the question whether the nature of title insurance causes it to be incidental to banking and therefore authorized under Section 24(Seventh), holding instead that Section 92 imposes a complete ban on all forms of insurance sales by national banks regardless of whether incidental to banking or not. Chase Pet. App. 15a-16a. Yet the Second Circuit purported to distinguish away the conflict with *Heimann* by claiming that credit life insurance is more closely incidental to banking than is title in-

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[7] *Independent Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) (deciding a similar issue under the Bank Holding Company Act and stating its disagreement with the Fifth Circuit's reading of Section 92).

[8] *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[9] *Sanford* v. *Garamendi*, 284 Cal. Rptr. 897 (Cal. App. 1991) (interpreting similar provision of state law).

[10] All of the federal cases just recounted assumed that Section 92 existed.

surance. Chase Pet. App. 14a-15a. As the Solicitor General states in his petition, however, under the Second Circuit's "interpretation of Section 92 [this] asserted distinction is irrelevant, since whatever their differences, both title insurance and credit life insurance are forms of insurance." OCC Pet. 11.

5. *The Second Circuit departed from the teachings of Chevron.* The OCC's determination is entitled to deference from the courts under *Chevron* and its progeny. *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987). While recognizing that Section 92 "obviously provides no explicit limitation on national bank activity" Chase Pet. App. 11a, the Second Circuit nonetheless held under the maxim "*expressio unius est exclusio alterius*" that the statutory language is clear and that therefore *Chevron* did not require the court to defer to the OCC's construction of the National Bank Act.

There are two fundamental flaws in the Second Circuit's decision to ignore *Chevron*. First, the opening words of Section 92 are "[t]hat in addition to the powers now vested by law in national banking associations . . . ." That statutory language plainly states that Section 92 is a grant of additional powers, not a limit upon powers granted by other provisions of the National Bank Act. That language displaces any vestige of the *expressio unius* doctrine.[11]

Moreover, even were that language not a part of Section 92, the *expressio unius* maxim does not override this Court's decisions in *Chevron* and *Clarke*. As this Court has previously noted, the *expressio unius* maxim "is a questionable one in light of the dubious reliability

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[11] *Cf. Crosby* v. *United States*, 113 S.Ct. 748 (1993) (interpreting Fed. R. Crim. Proc. 43 and holding that "express use of a limiting phrase" in the Rule established that "the language and structure of the Rule could not be more clear" thus rendering resort to the *expressio unius* maxim unnecessary).

of inferring specific intent from silence." [12] If the statute here were silent—as it is *not*, given the "in addition to the powers" language—statutory silence would trigger both application of the *expressio unius* maxim and deference to the administrative interpretation under *Chevron*. But it is in the case of statutory silence that administrative agencies are called on to exercise their *Chevron*-recognized powers to interpret the statutes they administer. Use of *expressio unius* to displace an administrative agency's interpretation of an ambiguous statute undermines the whole purpose of *Chevron*.

## CONCLUSION

For the reasons stated herein and in our petition and reply brief, and for the reasons stated by the Solicitor General, the petition for *certiorari* should be granted.

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[12] *Pauley* v. *BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2537-38 (1991) (quoting Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n. 182 (1990)); *accord*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23 (1983). As stated by the Solicitor General, "the enactment of Section 92 just shows that Congress thought that national banks could not engage in a general insurance agency practice; it does not show that Congress thought that national banks were prohibited from selling products (like title insurance) that the Comptroller of the Currency has determined are 'incidental' to 'the business of banking.'" OCC Reply Br. 3.